Supreme Court, U.S.
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No. 04-

IN THE

Supreme Court of the United States

PETRO-HUNT, L.L.C., *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Should the United States Court of Appeals for the Fifth Circuit ("Fifth Circuit") be allowed to restrict the scope of *res judicata* to matters actually litigated, as opposed to matters which could or should have been litigated, thus paving the way for piecemeal litigation, causing uncertainty as to the stability of final judgments and causing a waste of judicial resources?

II. Can the Fifth Circuit, contrary to other circuits, adopt a rule which precludes the application of collateral estoppel in any case where there has been a change in the applicable rule of law, even between the same parties?

III. Has the Fifth Circuit's decision, by overturning the district court's undisputed findings of fact, by reopening a lawsuit the federal government lost 50 years ago in violation of *res judicata*, and by expanding the "change of law" exception for collateral estoppel in defiance of this Court's narrowing of that exception in *Stauffer*, "so far departed from the accepted and usual course of judicial proceedings. . . . as to call for an exercise" of this Court's supervisory power?

LIST OF PARTIES

The Petitioners (Plaintiffs-Appellees below) are:

Petro - Hunt, L.L.C.;
Hunt Petroleum Corporation and
Kingfisher Resources, Inc.

The Respondents (Defendants-Appellants below) are:

The United States of America

Other Defendants below are:

Aspect Resources, L.L.C.;
Bayou Petroleum Co.;
Catawba Energy, Inc.;
First Texas Hydrocarbons, Inc.;
Oscar C. Forland;
Gulf Coast Oil & Gas Co.;
Justiss Oil Co.;
MB Exploration, L.L.C.;
Northstar Energy, L.L.C.;
Palmer Petroleum, Inc.;
Howell R. Spear;
John P. Strang;
Wheless T.D.L. Exploration Co., L.L.C.;
Ocean Energy Resources Inc.,
formerly known as UMC Petroleum Corp.;
Devon S.F.S. Operating, Inc.,
formerly known as Santa Fe Snyder Corp.;
J. Bradley Jeffreys;
Energy Arrow Exploration, L.L.C., and
Carruthers Producing Company, Inc.

CORPORATE DISCLOSURE STATEMENT

Petro-Hunt, L.L.C. is a Delaware limited liability company and is wholly owned by the William Herbert Hunt Trust Estate, a Texas Trust. Neither Petro-Hunt nor the parent trust are publicly traded entities.

Hunt Petroleum Corporation is incorporated in Delaware. It is a privately held company. Hunt Petroleum Corporation stock is not publicly traded.

Kingfisher Resources, Inc. is incorporated in Delaware. It is a privately held company. Kingfisher Resources, Inc. stock is not publicly traded. Kingfisher is wholly owned by Rosewood Resources, Inc. ("Rosewood"), a Delaware corporation. Rosewood is a privately held corporation. Its stock is not publicly traded.

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Petro-Hunt, L.L.C., Hunt Petroleum Corporation and Kingfisher Resources, Inc., respectfully request that a Writ of *Certiorari* issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this case on March 31, 2004 and revised on May 28, 2004.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 365 F.3d 385 (5th Cir. 2004) and is reprinted at Appendix ("App".) A. The denial of the petitions for Panel Rehearing and Rehearing *En Banc* is reprinted at App. B. The original panel opinion is not reported but is reprinted at App. B. The opinion of the United States District Court for the Western District of Louisiana is reported at 179 F. Supp. 2d 669 (W.D. La. 2001), and is reprinted at App. D. The District Court's Judgment is reprinted at App. C.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fifth Circuit issued its judgment and opinion on March 31, 2004. The Fifth Circuit issued a "revised opinion" on May 28, 2004. The Fifth Circuit denied the Petition for Panel Rehearing and the Petition for Rehearing *En Banc* on June 1, 2004. This petition has been filed within ninety days of the denial of rehearing. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS PROVIDED

This case was brought under the Quiet Title Act, 28 U.S.C. § 2409(A).

The Weeks Act, 1911, 36 Stat. 961, codified as amended in scattered sections of Title 16 U.S.C., created the National Forest System. The minerals at issue in this case are situated beneath lands purchased by the United States pursuant to the Weeks Act. The full text of this statute is located at App. F.

Louisiana Act 315 of 1940, now found at La. Rev. Stat. Ann. § 31:149 (West 2004), provides that

> when land is acquired by the United States of America, or any of its subdivisions or agencies . . . , and . . . . oil, gas, and/or other minerals or royalties

> are reserved, or the land so acquired is by the act of acquisition conveyed subject to a prior sale or reservation of oil, gas, and/or other minerals or royalties, still in force and effect, said rights so reserved or previously sold shall be imprescriptable.

The complete text of Louisiana Act 315 of 1940 is set forth at App. G.

The Just Compensation Clause and the Due Process Clause of the Fifth Amendment to the United States Constitution provide that "no person shall be . . . deprived of . . . property without due process of law, nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

A. Facts and Background

This case involves the doctrine of *res judicata* - claim preclusion and issue preclusion (collateral estoppel). Consequently, an understanding of the facts of the underlying litigation is necessary to an understanding of the present case.

Petitioners brought this quiet title action claiming title to approximately 180,000 mineral acres located in Grant, Natchitoches, and Winn Parishes in central Louisiana. During the 1930s, five lumber companies pooled their mineral interests in this and other property and formed Good Pine Oil Company ("Good Pine") to act as a holding company for their mineral property. This arrangement allowed all five companies to share in any mineral production from the property, based upon the percentage of the total acreage each company had conveyed to Good Pine. Two of the five lumber companies, Bodcaw Lumber Company of Louisiana, Inc. ("Bodcaw") and Grant Timber Company of Louisiana, Inc. ("Grant") conveyed more than 180,000 acres of mineral interests to Good Pine by six identical conveyance instruments between November 16, 1932 and November 3, 1934.

About the same time, the United States was trying to acquire land for the purpose of establishing a national forest,[1] but was having difficulty buying land in Louisiana because Louisiana's mineral law does not allow a landowner to permanently sever the mineral estate from the surface estate. *See, e.g., Frost-Johnson Lumber Co. v. Sallings Heirs*, 150 La. 756, 91 So. 207 (La. 1922). Mineral interests can only be severed from the surface for a period of 10 years in the absence of drilling or production (with certain statutory exceptions).[2] Thus, if there has been no drilling or production for 10 years (the prescription period), the mineral interest ordinarily reverts to the surface owner. La. Rev. Stat. Ann. § 31:27, 31 (West 2004). *See Petro-Hunt, L.L.C. v. United States*, 179 F. Supp. 2d 669 (W.D. La. 2001).

Louisiana landowners were willing to sell the surface to the United States, but not the minerals.[3] In order to solve this problem, the Solicitor's Office for the U.S. Department of Agriculture provided Bodcaw a legal opinion, stating that pursuant to federal law, if the surface was sold to the government, the mineral interests would not prescribe and the grantors could retain their minerals. *Nebo, supra*, 190 F.2d at 1005, 1006. Another solution, provided by the Louisiana Legislature, was passage of Act 315 of 1940, now codified as La. Rev. Stat. Ann. § 31:149 (West 2004), providing that the Louisiana laws of mineral prescription did not apply to land sold to the United States. This statute was later amended to apply to the State of Louisiana as well.

Between 1934 and 1937, Bodcaw and Grant sold to the United States the surface of (more or less) the same 180,000 acres conveyed to Good Pine for mineral development. All of this property was sold for prices between $1.75 and $2.50 per

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1. The government acted pursuant to the Weeks Act, the enabling legislation that created the National Forest System.). *See* Weeks Act, ch. 186, 36 Stat. 961 (1911) (codified, as amended, in scattered sections of 16 U.S.C.).

2. *See* La. Rev. Stat. Ann. § 31:149 - 152 (West 2004).

3. Common law states allow minerals to be permanently severed. There is no direct common-law equivalent to a Louisiana mineral servitude. *Texaco v. La. Land and Exploration*, 136 B.R. 658 (M.D. La. 1992).

acre. R. Doc. 85, Ex. C, pp. 4-8 (Hughes Affidavit). This property is now part of the Kisatchie National Forest which consists of more than 600,000 acres.

Contrary to its earlier representations that the Louisiana rules of prescription would not apply to land sold to the government, the United States filed suit in 1948 to litigate mineral title to approximately 800 acres (part of the 180,000 acres). The court ruled that title to the minerals belonged to Good Pine's successor in interest, Nebo Oil Co. *United States v. Nebo Oil Company*, 90 F. Supp. 73 (W.D. La. 1950), *aff'd*, 190 F.2d 1003 (5th Cir. 1951). Specifically, the *Nebo* District Court held that Louisiana Act 315 of 1940 could be constitutionally applied -- both retroactively[4] and prospectively -- and that the United States could not and did not acquire the mineral interests by prescription based upon non-use for 10 years. That decision was affirmed in *United States v. Nebo Oil Co.*, 190 F.2d 1003 (5th Cir. 1951).

Plaintiffs below, petitioners here, are the successors in interest to Nebo Oil Company, and are parties in privity with Nebo for the purposes of this litigation. *See, e.g., S. Pac. R.R. Co. v. United States*, 168 U.S. 1 (1897). Thus, the mutuality requirements of *United States v. Mendoza*, 464 U.S. 154 (1984), are met.

In *Nebo*, both the District Court and the Fifth Circuit recited numerous facts upon which the decision was based. The Fifth Circuit took note of the difficulty the government was having buying land for the national forest.

> Prior to the year 1936 the United States was interested in purchasing lands in Louisiana for National Forest purposes and had found that owners of large tracts of land were unwilling to sell their lands because of court decisions holding that the sale or reservation of mineral rights in Louisiana created only a right in the nature of the servitude which was subject to prescription by 10

4. *See Petro-Hunt, L.L.C. v. United States*, 179 F. Supp. 2d 669, 673 n.7 (W.D. La. 2001) ("[S]tating that the statute was retroactively applied is a bit of a misnomer. Act 315 of 1940 was merely applied from the moment of its legislative birth . . . .")

> years non-user [sic]. *However, the United States Department of Agriculture, Forest Service, was not in accord with this view and on May 29, 1935, submitted to Bodcaw Lumber Company an opinion of the Assistant Solicitor of the Department of Agriculture to the effect that the prescriptive provisions of the Louisiana Civil Code would not apply to lands sold to the United States for National Forest purposes.*

190 F.2d 1005 (emphasis added).

The Fifth Circuit upheld the detailed findings of fact of the District Court, and its conclusion that the government did not intend to buy, and did not pay for the minerals. 90 F. Supp. at 86-88; 190 F.2d at 1009-1010.

Nebo found that mineral ownership was not necessary for the purpose of establishing a national forest. In this regard the District Court stated:

> Since the outstanding mineral ownership . . . is not regarded by the United States as interfering with the primary purpose for which the lands were acquired under the Weeks Law, it cannot successfully be argued that Louisiana Act 315 of 1940, which affects only the outstanding title to such minerals, is unconstitutional in violation of Article IV, Section 3, Clause 2, of the Federal Constitution.

90 F. Supp. at 88. Further, the District Court noted:

> Moreover, the minutes of the meetings of the National Forest Reservation [Commission] . . . conclusively prove that the Commission has authorized the acquisition of millions of acres of land subject to the reservation of mineral rights in perpetuity, and has repeatedly authorized the acquisition of tracts where the mineral rights were outstanding in third persons on the ground that "such mineral rights will not interfere with the use of the land for national forest purposes or diminish the value of the land."

90 F. Supp. at 87. *See also* 90 F. Supp. at 90. (The National Forest Reservation Commission decided "it had no authority to

purchase minerals with funds which had been appropriated . . . for national forest purposes.")

After the *Nebo* judgment became final, both Nebo Oil and the government took actions that reflected their shared belief about the broad implications of that judgment. The Nebo company officials recorded the judgment in the land records of Grant, Winn and Natchitoches Parishes, and also filed affidavits claiming title to all of the 180,000 acres, not just the 800 acres described in the government's suit. R. Doc. 85, Ex. B to Ex. C (Hughes Affidavit). As late as April 2001, the Forest Service's own records reflected that this mineral property was held by "third parties" "in perpetuity." R. Doc. 85, Ex. C.

B. Proceedings Below

Notwithstanding that its own records reflected adverse title, in 1991, the Forest Service nominated this property for mineral leasing by the Bureau of Land Management. BLM began issuing mineral leases to members of the public. Petitioners sued to quiet title. The District Court granted petitioners' summary judgment motion based upon *res judicata*, and held all 180,000 mineral acres belonged to petitioners. *Petro-Hunt, L.L.C. v. United States*, 179 F. Supp. 2d 669 (W.D. La. 2001.)

On appeal, the Fifth Circuit, citing essentially the same case law as the District Court, reached the opposite result. *Petro-Hunt, L.L.C. v. United States*, 365 F.3d 385 (5th Cir. 2004). Not only did the Fifth Circuit reverse summary judgment for petitioners, but, surprisingly, it seemed to rule for the government on the title issue, thereby depriving petitioners of a trial on remand. In doing so, the Fifth Circuit rejected, out of hand, the District Court's undisputed finding of facts that all the subject property was "similarly situated" and that title to same was created by identical conveyances and that the government had a "full and fair opportunity" to litigate the question of title to the entire 180,000 acres in *Nebo*. 179 F. Supp. 2d at 682. Further, the Fifth Circuit applied a heretofore narrow exception to the usual collateral estoppel rule, an exception for pure legal issues based upon a change in the prevailing law. *See Restatement (Second) of Judgments* § 28(2). The government argued there was a change in precedent as a result

of *United States v. Little Lake Misere Land Co.*, 412 U.S. 580 (1973). Ultimately, the Fifth Circuit held this change in the law precluded the application of collateral estoppel, and that *res judicata* only applied to the 800 acres specifically described in the government's *Nebo* complaint.

Plaintiffs - petitioners filed a Petition for Panel Rehearing and a Petition for Rehearing *En Banc*. Both were denied on June 1, 2004. App. E.

Petitioners now file this Petition for *certiorari*, and seek to have this court remedy the conflict in the circuits created by the Fifth Circuit's decision.

REASONS FOR GRANTING THE PETITION

I. The Court should grant a writ of *certiorari* to resolve the conflict between the Fifth Circuit and the other federal circuit courts, and to remedy the extreme departure from this Court's decisions regarding *res judicata*.

Res Judicata

The Fifth Circuit has eviscerated the doctrine of *res judicata*. If the Fifth Circuit opinion is allowed to stand, the law of *res judicata*, as it applies to private property rights, will become unsettled, due to the split among the circuits created by this rogue opinion. *See, e.g., In re Colonial Mtg. Bankers v. Lopez-Stubbe*, 324 F.3d 12 (1st Cir. 2003); *Tahoe-Sierra Pres. Council Inc. v. Tahoe Reg'l Planning Agency*, 322 F.3d 1064 (9th Cir. 2003); *Havercombe v. Dep't of Educ.*, 250 F.3d 1 (1st Cir. 2001); *Bethesda Lutheran Homes & Servs. v. Born*, 238 F.3d 853 (7th Cir. 2001); *Ragsdale v. Rubbermaid, Inc.*,193 F.3d 1235 (11th Cir. 1999), *cert. denied*, 530 U.S. 1223 (2000); *Sure-Snap Corp. v. State St. Bank & Trust Co.*, 948 F.2d 869 (2d Cir. 1991).

All the pertinent claims and issues involving the mineral property in question were raised and litigated to a conclusion more than 50 years ago in *United States v. Nebo Oil Co.*[5] The *Nebo* decision should control the outcome of this case as the District Court found. However, the Fifth Circuit reversed the District Court, purporting to base its decision on the inapposite cases of *United States v. Little Lake Misere Land Co.*,

5. 90 F. Supp. 73 (W.D. La. 1950), *aff'd*, 190 F.2d 1003 (5th Cir. 1951).

Inc., 412 U.S. 580 (1973), and *Cent. Pines Land Co. v. United States*, 274 F.3d 881 (5th Cir. 2001), *cert. denied*, 537 U.S. 822 (2002). In the process, the Fifth Circuit created a significant conflict with the *res judicata* decisions of other circuits and took the long accepted rules of *res judicata* and collateral estoppel off on a bizarre tangent.

The Fifth Circuit has allowed the government to defeat *res judicata* largely by use of its longevity as a litigant. Under this new rule the government will be able to relitigate directly related claims until it obtains the result it wants. This is exactly the sort of improper litigation conduct this Court found unacceptable in *Montana v. United States*, 440 U.S. 147 (1979); and *United States v. Stauffer Chem. Co.*, 464 U.S. 165 (1984). While the United States may have been given freedom by this Court to relitigate *issues; See United States v. Mendoza*, 464 U.S. 154 (1984); the government cannot relitigate *claims* with the same party, nor the *same issues* with *the same parties*. *United States v. Stauffer Chem. Co.*, 464 U.S. 165 (1984); *Nevada v. United States*, 463 U.S. 110 (1983).

The Fifth Circuit's decision has "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise" of this Court's supervisory power. Sup. Ct. R. 10(a). The fundamental purpose of the doctrine of *res judicata* is to deter repetitive and piecemeal litigation and to conserve judicial resources. "*[R]es judicata* and collateral estoppel relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication." *Allen v. McCurry*, 449 U.S. 90,94 (1980). "[T]he doctrine of *res judicata*, judicial in origin, was established for the primary purpose of avoiding repetitive litigation of the same causes of action." *Expert Elec., Inc. v. Levine*, 554 F.2d 1227, 1232 (2d Cir. 1977), *cert. denied* 434 U.S. 903 (1977). *See also Churchill v. Star Enters.*, 183 F.3d 184 (3d Cir. 1999). The Fifth Circuit did much more than misapply the law. It concocted a *new* rule which substantially restricts the scope of *res judicata* which will unfairly benefit repeat litigants like the United States. "[J]udicial action must be governed by *standard*, by *rule*. Law promulgated by the Legislative Branch can be inconsistent, illogical, and

ad hoc; law pronounced by the courts must be principled, rational, and based upon reasoned distinctions. *Vieth v. Jubelirer*, __, U.S. __, 124 S. Ct. 1769, 1777 (2004) (Scalia, J., for a plurality) (emphasis by the Court). This Court should exercise its supervisory power, because the Fifth Circuit's aberrant rule has far-ranging, negative implications that go well beyond this litigation.

The Fifth Circuit's Decision Will Encourage Piecemeal Litigation

The Fifth Circuit's decision allows piecemeal litigation, *by the same parties*. In particular, the decision here would allow title to the 180,000 mineral acres to be litigated an acre at a time, thereby wasting valuable judicial resources. All of these 180,000 mineral acres were transferred to Good Pine in six conveyances (four made by Bodcaw and two made by Grant). Significantly, the language in each of the six conveyances is not only "virtually identical," *United States v. Stauffer Chem. Co.*, 464 U.S. 165, 172 (1984), but, in fact, *is identical*. All of this property is contained in two rather large tracts in close proximity. R.Doc. 88, Ex. A, Ex. C (map).

Between 1934 and 1939, Grant and Bodcaw conveyed the surface of these lands[6] to the United States in nine conveyance instruments. All of the conveyances were subject to the outstanding mineral servitudes. R.Doc. 85, Ex. C.[7] *See also* 179 F. Supp. 2d at 674.

In its ruling, the *Nebo* District Court specifically found the government did not need the minerals for the purpose of a national forest, did not pay for the minerals and did not intend to buy the minerals. Also, the government represented that under federal law the Louisiana prescriptive rules would not apply to this mineral property. The *Nebo* District Court held that Act 315 of 1940 did not deprive the government of any

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6. This suit involves title to mineral property of approximately 180,000 acres±. The title to the surface for the most part overlays this 180,000 acres, but is not exactly identical to the particular 180,000 acres of mineral property to which plaintiffs-petitioners claim ownership. R. Doc. 85, Ex. C.

7. Approximately 1,000 acres of the property at issue here was acquired by the United States by two expropriation suits. This property was also acquired subject to the mineral servitudes and mineral interests of Good Pine Oil. R. Doc. 85, Ex. C at 5,7.

bargain it had made. *Nebo*, 90 F. Supp. at 86-88, *aff'd*, 190 F.2d at 1005-1010.

Thus, Act 315 of 1940 did no more than effectively codify the government's title opinion. Both the title opinion and Act 315 of 1940 denied the government the right to acquire the minerals appurtenant to the surface by prescription of non-use.

The United States claims it filed suit against Nebo Oil in 1948 because Nebo was "threatening to drill" on the 800 acres it selected for the suit (out of 180,000 acres.)[8] However, it seems apparent the reason for the litigation was to test the waters and to challenge the constitutionality of Act 315 of 1940, even though the government was acting completely counter to its 1935 title opinion given only 13 years earlier.

By this time there had already been significant litigation over Act 315 of 1940. *See Whitney Nat'l Bank of New Orleans v. Little Creek Oil Co., Inc.*, 212 La. 949, 33 So. 2d 693 (1947). In *Whitney Bank*, the Louisiana Supreme Court had declined to rule on the ultimate constitutionality of Act 315 of 1940 because the United States was a necessary party to that litigation. That court, however, did rule there was no vested right in a prescriptive rule, and with adequate notice the legislature could change a prescriptive period.

Little Lake Misere

In the early 1970's the government obtained a result contrary to the *Nebo* case in *United States v. Little Lake Misere Land Co., Inc.*, 412 U.S. 580 (1973). However, even there the Supreme Court distinguished *Nebo* on its facts in a footnote. 412 U.S. at 586 n.4. *Little Lake* held Act 315 of 1940 could not be constitutionally applied in that case where the government had acquired land pursuant to the Migratory Bird Act, an entirely different statutory scheme from the Weeks Act. *Little Lake* turned on choice of law analysis; the majority held under the *Clearfield Trust*[9] doctrine, federal, rather than state law was to apply. The majority rejected Act 315 of 1940 as

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8. Reply Brief as Appellant and Response Brief as Cross-Appellee of the United States, p. 26. (In the record but not yet numbered by the court).

9. *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943).

"aberrant or hostile" to the government. Consequently, this Court did not overrule the Fifth Circuit's *Nebo* decision which found Act 315 of 1940 passed constitutional muster. 412 U.S. at 606. *See Cent. Pines Land Co. v. United States*, 274 F.3d 881 (5th Cir. 2001), *cert. denied*, 537 U.S. 822 (2002). Then Associate Justice Rehnquist, concurred in the judgment, but wrote that the Court should have addressed the constitutionality of Act 315 of 1940, rather than side step the issue by choice of law analysis. *See* 412 U.S. at 606. (Rehnquist, J. concurring.) *See also id.* at 603 (Stewart, J., concurring.)

The Present Case

Approximately forty years after *Nebo*, the United States, rather than file its own quiet title action, unilaterally began to issue mineral leases on this land, which its own records reflected it did not own. R.Doc. 85, Ex. G.; 8:761. Plaintiffs complained and eventually filed suit.

In the instant litigation, the District Court found that title to the entirety of the property was vested in plaintiffs - petitioners, as successors in interest to Nebo, as a result of the doctrine of *res judicata*.[10] *Petro-Hunt, L.L.C. v. United States*, 179 F. Supp. 2d 669 (W.D. La. 2001).

As this Court has explained:

> Under the doctrine of *res judicata*, a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action. Under the doctrine of collateral estoppel, on the other hand, the second action is upon a different cause of action and the judgment in the prior suit precludes relitigation of issues actually litigated and necessary to the outcome of the first action. [citations omitted]

Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322, 327 n.5 (1979).

In this case, the Fifth Circuit has confused the two rules, and has effectively held that *res judicata* only bars claims actually litigated. "In general, a judgment is *res judicata* not

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10. As noted by the District Court, *res judicata* pertains to claim preclusion and issue preclusion. *See, e.g.*,18 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure*, § 4402 (2002).

only as to all matters litigated and decided by it, but as to all relevant issues which could have been but were not raised and litigated in that suit." *Heiser v. Woodruff*, 327 U.S. 726, 735 (1946). Further, the rule, as set forth by this Court many years ago, requires litigants to litigate all of their related claims at once rather than on a piecemeal basis. *Grubb v. Pub. Utils. Comm'n of Ohio*, 281 U.S 470, 479 (1930).

The Same Claim or Related Claims

The facts to be considered when determining if the two actions are the same or so closely related to constitute the same claim are:

> [T]heir relatedness in time, space, origin or motivation, and whether, taken together, they form a convenient unit for the purposes of trial. Though no single factor is determinative, the relevance of trial convenience makes it appropriate to ask how far the witnesses or proofs in the second action would tend to overlap the witnesses and proofs relevant to the first. If there is a substantial overlap, the second action should ordinarily be held precluded.

Restatement (Second) of Judgments, § 24, cmt. b.[11]

Here the facts show the claims or causes of action in the present case are the same claims that were or could have been litigated in *Nebo*. The six mineral conveyances are all identical in their terms. The grantors are the same; the grantees are the same. The purpose for which the conveyances were made are the same. The conveyances to the government were made by the same grantors as the grantors to Good Pine, and were all for the purpose of the national forest. The language in all the conveyance instruments to the government is materially or

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11. The Fifth Circuit has previously adopted this so called "transaction test" from *Restatement (Second) of Judgments*, § 24. *See Agrielectric Power Partners v. Gen. Elec. Co.*, 20 F.3d 663 (5th Cir. 1994). Other Circuits have adopted the transaction test as well. *See, e.g., In re Iannochino*, 242 F.3d 36 (1st Cir. 2001); *Monahan v. New York City Dep't. of Corr.*, 214 F.3d 275 (2d Cir. 2000), *cert. denied*, 531 U.S. 1035 (2000); *Mass. Sch. of Law, Inc. v. Am. Bar Ass'n*, 142 F.3d 26 (1st Cir. 1998); *Andersen v. Chrysler Corp.*, 99 F.3d 846 (7th Cir. 1996) and *W. Sys., Inc. v. Ulloa*, 958 F.2d 864 (9th Cir. 1992).

"virtually identical."[12] *See Stauffer*, 464 U.S. at 173. Further, all of the conveyances had been made and were extant by the time of the *Nebo* litigation. *See* 18 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure*, § 4425 (2002) (hereinafter "Wright & Miller"). Had the government included the entire 180,000 acres in the *Nebo* litigation it is obvious the evidence and the testimony would have been virtually the same. The only additional evidence would likely have been the additional conveyance instruments themselves, which are all alike anyway. As found by the District Court, if all 180,000 acres had been included, "it would not have changed the decision of that [*Nebo*] Court." 179 F. Supp. 2d at 682.[13]

The Fifth Circuit complained that neither the District Court nor petitioners provided or identified "a principle of *res judicata* that requires an owner of separate properties to litigate title to all of those properties in response to a threat to his right of full enjoyment and use of only one of them."

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12. "In addition, all of the surface of the disputed acreage was acquired by the United States pursuant to the Weeks Act and none of the language in such deeds or mineral reservations would have warranted a different legal conclusion at the time of *Nebo Oil*. Accordingly, this Court finds that the entire 180,000 acres was similarly situated to the 800 acres at issue in *Nebo Oil*." 179 F. Supp. 3d at 682.

13. "The United States concedes that the ownership of the mineral rights underlying the 800 acres involved in *Nebo Oil* was decided and cannot be revisited here." (Def.'s Opp.M.Summ.J., pg. 11 [Doc. 133]). This Court also finds that the Fifth Circuit applied Act 315 of 1940 to the mineral reservation and sale of the 24,943.93 acre tract to the United States, of which the 800 acres was a part. Accordingly, those minerals underlying the 24,943.93 acre tract were previously held imprescriptible and *res judicata* clearly applies.

As previously discussed, this Court finds that the five other servitudes and the later mineral reservations burdening the 180,000 acres are virtually identical to the servitude and reservation at issue in *Nebo Oil*. . . .

From an examination of *Nebo Oil*, it is obvious that had the government elected, as plaintiff in *Nebo Oil*, to include all similarly situated acreage in that suit, it would not have changed the decision of that Court. The government has had a "full and fair opportunity" to litigate the application and constitutionality of Louisiana Act 315 of 1940 to this mineral property. The government should not be allowed to litigate now that which it could have litigated 50 years ago." 179 F. Supp. 2d at 682.

365 F.3d at 396. The Fifth Circuit thus rejected the District Court's undisputed findings of fact, without a single word about any standard, "clearly erroneous," or otherwise, for such review. While the *de novo* standard applies to review of summary judgments, the Court of Appeals is not, or should not be, free to change the undisputed facts found by the District Court. *See, e.g., Inwood Labs. v. Ives Labs.*, 456 U.S. 844 (1982). The District Court did not find this property was "separate," as characterized by the Fifth Circuit. Rather, the District Court found that the property was all "similarly situated," that is, alike in all pertinent respects. 179 F. Supp. 2d at 682.

Similar Land Title Cases

Petitioners provided the District Court and the Fifth Circuit with the following decisions, all of which involved litigation of title to similarly situated land in successive cases. In each case the court held the decision as to title in the first litigation controlled as to the second litigation. Premier among these cases is *Southern Pacific R.R. Co. v. United States*, 168 U.S. 1 (1897). *See also United States v. Nevada*, 463 U.S. 110 (1983); *United States v. S. Pac. R.R. Co.*, 146 U.S. 570 (1892); *United States v. Colton Marble and Lime Co.*, 146 U.S. 615 (1892); *Moore v. Swayne-Hunter Farms, Inc.*, 841 S.W.2d 308 (Mo. Ct. App. 1992); *Peasley v. State*, 424 N.Y.S.2d 995 (N.Y. Ct. Cl. 1980); *Custer v. Hall*, 71 W. Va. 119, 76 S.E. 183 (W. Va. 1912).

The case of *Southern Pacific R.R. Co. v. United States, supra*,[14] presents an analogous set of facts. In *Southern Pacific*, the United States brought suit to quiet title to lands along a railroad right of way. In previous decisions[15] this Court had found that certain maps determined title to land depicted on those maps, and ultimately the maps determined the title to land along the railroad right-of-way. In the 1897 case, this Court held that the maps, determinative of title in one case, were determinative of title to all the other land depicted on the maps. In so finding the Court stated:

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14. *Southern Pacific* is pertinent here even though it is also regarded as a collateral estoppel case. *Burlington N. R.R. Co. v. Hyundai Merch. Marine Co., Ltd.*, 63 F.3d 1227, 1232, n.3 (3d Cir. 1995).

15. *United States v. S. Pac. R.R. Co.*, 146 U.S. 570 (1892); and *United States v. Colton Marble and Lime Co.*, 146 U.S. 615 (1892).

> The general principal announced in numerous cases is that a right, question, or fact distinctly put in issue, and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in the subsequent suit between the same parties or their privies; and, even if the second suit is for a different cause of action, the right, question or fact once so determined, must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified.

168 U.S. at 48-49.

In *Moore*, the court held that a condemnation proceeding in 1960 to condemn about ten acres of a 160 acre tract had conclusively decided title to the entire 160 acres, and the 1960 judgment barred the same litigants or their privies from relitigating title to the remaining 150 acres in a later suit. In so holding, the court, citing older authority, said:

> In *Custer v. Hall* [citation omitted] it is held that an adjudication of title to a particular tract of land, or an undivided interest therein, is conclusive between the same parties with respect to the title to another tract claimed adversely by them, in the same manner and under the same chain of conveyances.

841 S.W.2d at 313; *Custer v. Hall*, 71 W. Va. 119, 71 S.E. 183 (1912).

In *Peasley v. State, supra*, the New York Court of Claims held collateral estoppel barred the State of New York from relitigating title to a portion of a parcel of land where it had previously been decided the state had no title to another portion of that parcel of land. The court noted the state had a "full and fair opportunity" to litigate the title issue in the first suit. A precise selection of a part of similarly situated acreage in the first suit did not mean the state could litigate title to the remainder in a subsequent suit. 424 N.Y.S.2d at 1001.

In *Nevada v. United States*, 463 U.S. 110 (1983), this Court did not allow the United States to relitigate issues involving a court approved settlement agreement concerning rights to water from

the Truckee River for the benefit of an Indian reservation. Judgment was entered in 1944. Twenty-nine years later the government sought to relitigate title to the water rights and to enhance those rights for certain parties in the original litigation. In explaining the rules of *res judicata*, this Court stated:

> Simply put, the doctrine of *res judicata* provides that when a final judgment has been entered on the merits of a case, "[i]t is a finality as to the claim or demand in controversy, concluding parties and those in privy with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose."

463 U.S. at 129-30. (quoting from *Cromwell v. County of Sac*, 94 U.S. 351, 352 (1876)).

Further, the Court stated in a footnote:

> The policies advanced by the doctrine of *res judicata* perhaps are at their zenith in cases concerning real property, land and water. [citations omitted] "Where questions arise which affect titles to land it is of great importance to the public that when they are once decided they should no longer be considered open. Such decisions become rules of property, and *many titles may be injuriously affected by their change*. . . .[W]here courts vacillate and overrule their own decisions . . . affecting the title to real property, their decisions are retrospective and may affect titles purchased on the faith of their stability. Doubtful questions on subjects of this nature, when once decided, should be considered no longer doubtful or subject to change."

463 U.S. at 129 n.10 (quoting *Minn. Co. v. Nat'l Co.*, 70 U.S. (3 Wall.) 332, 334 (1866)) (emphasis added).

Claims That Were or Could Have Been Litigated

The rule of *res judicata* applies to all claims which were or could have been previously litigated. *Richards v. Jefferson County, Ala.*, 517 U.S. 793 (1996). As another circuit has explained: "[T]he fact that *res judicata* depends on 'an identity

of claims' does not mean that an imaginative attorney may avoid preclusion by attaching a different legal label to an issue that has, or could have been litigated." *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 322 F.3d 1064, 1077-78 (9th Cir. 2003).

It is incontrovertible that the government could have litigated title to the entire 180,000 acres in *Nebo*. As explained by the District Court below: "The government is not free to select a particular 800 acres, litigate over that, lose, and then re-litigate other parcels of land which are similarly situated." 179 F. Supp. 2d at 681. The Fifth Circuit's decision in the instant case changes the rule espoused in *Jefferson County*, and restricts *res judicata* to matters *actually* raised in the prior litigation.

In assessing whether a claim could or should have been brought in prior litigation, previous Fifth Circuit decisions have considered "whether and to what extent [a party] had "actual or imputed awareness . . . of a real potential for claims . . . such as those asserted" in the later proceeding, and whether the initial venue afforded an opportunity to allow such claims to be effectively litigated. *In re Intelogic Trace, Inc.*, 200 F.3d 382, 388 (5th Cir. 2000). If these conditions are met, the claims could or should have been brought together and *res judicata* will apply.

> In the Eleventh Circuit, [t]he principal test for determining whether the causes of action are the same is whether the primary right and duty are the same in each case. In determining whether the causes of action are the same, a court must compare the substance of the actions not their form.

Ragsdale v. Rubber Maid, Inc., 193 F.3d 1235, 1239 (11th Cir. 1999), *cert. denied*, 530 U.S. 1223 (2000), citing, *Citibank N.A. v. Data Lease Fin. Corp.*, 904 F.2d 1498, 1503. (11th Cir. 1990). *See also In re Colonial Mtg. Bankers v. Lopez-Stubbe*, 324 F.3d 12, 20 (1st Cir. 2003) ("[R]es *judicata* bars not only those theories that were actually litigated in the earlier action, but those theories that could have been litigated . . ."); *Bethesda Lutheran Homes & Servs. v. Born*, 238 F.3d 853, 857 (7th Cir. 2001) ("[F]or purposes of *res judicata* a claim is not an argument or a ground but the events claimed to give rise to a right to a legal remedy.")

The United States was in possession of the surface at the time of *Nebo*. The petitioners' six mineral servitudes were each outstanding and a matter of public record for less than the 10 year prescriptive period when Act 315 of 1940 was enacted. 179 F. Supp. 2d at 682. Certainly, the United States knew the potential for other claims existed against Nebo Oil at the time it instituted the *Nebo* litigation.

The government's contention that its title claims were "not ripe" for adjudication in the previous action because the prescriptive period of non-use had not run against other parts of the 180,000 acres was quickly and correctly rejected by the District Court: "There was no reason for the United States to wait 10 years to litigate title to property whose owners claimed it would never prescribe." 179 F. Supp. 2d at 676.

Res judicata is the linchpin of the litigation process. The District Court was correct in finding the scope and breadth of the rule of *res judicata* encompasses all of this similarly situated property, and that title to the entire 180,000 mineral acres was decided by *Nebo*. The Fifth Circuit's new rule substantially restricts the scope of *res judicata*, and is at odds with the other Circuits and decisions of this Court. The finality of judgments fulfills the ultimate goal of litigation, which is to permanently resolve disputes among citizens. *Res judicata* should be uniformly applied in the circuits, and *certiorari* should be granted to achieve this uniformity.

A Red Herring

Part of the Fifth Circuit's error lies in the confusion created by the government introducing a red herring. Plaintiffs filed a summary judgment motion based on *res judicata* and collateral estoppel, and also filed an alternative motion for summary judgment based on the amount of acreage title to which would be held by the Louisiana prescriptive rules (drilling or production) even in the absence of Act 315 of 1940.[16] In support of the second motion, plaintiffs' title examiner, Daniel C. Hughes, Esq., opined in an affidavit that for the purpose of determining which areas would be held by drilling or

16. The District Court ordered the parties to file summary judgment motions "as to all issues that may potentially be resolved by such motions." R.4:321.

production in the absence of Act 315 of 1940, the 180,000 acres was separated into 96 "servitudes" or areas. This determination is based upon a concept in Louisiana title law known as "contiguity" or contiguous tracts that are not subdivided by navigable waterways, or fee title roads or railroads, etc. R.Doc. 88, Ex. A; La. Rev. Stat. Ann. § 31:64 (West 2004). This determination has nothing to do with the conveyance instruments.[17] As found by the District Court, all of these facts are irrelevant to the issue of title, assuming the application of Act 315 of 1940. 179 F. Supp. 2d at 678. However, the government led the Fifth Circuit to believe there were 96 "separate" or stand alone pieces of property. This is simply not true.

The government also misled the court by its assertion that every conveyance and every mineral servitude and its production history constitute different operative facts. The mineral histories of the servitudes are irrelevant to an inquiry into the reach and constitutionality of Act 315 of 1940. 179 F. Supp. 2d at 678. Even the Fifth Circuit conceded that, for the purpose of determination of applicability of Act 315 of 1940, the drilling histories were irrelevant. 385 F.3d at 397. The government led the Court to believe the 800 acres selected by the government in *Nebo* was one of the 96 servitudes. It is actually only a part of one.[18]

As noted by the District Court, petitioners assert that the servitudes are held in perpetuity for so long as the surface is held by the government. 179 F. Supp. 2d at 676. Therefore, use of the servitudes is immaterial. The District Court's determination, that all of the mineral conveyances were virtually identical and all of the property was similarly situated

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17. By way of example, assume 100 acres is contained in a mineral servitude; one well drilled anywhere on that 100 acres would not be sufficient to hold title to that acreage for 10 years unless the entire 100 acres was "contiguous." So that if the 100 acre tract is bisected by a navigable river, there would be two individual "servitudes" and each would require use by drilling or production to toll the 10 year prescriptive period.

18. This can be determined by comparing the property description in the government's *Nebo* complaint with the information in Mr. Hughes' affidavit. The latter is in the record, the former in the public record. R.Doc. 85, Ex. C.

in terms of location, time, manner and purpose of creation, was sufficient to support its finding there was a common nucleus of operative facts. It, thus, was unnecessary, as the District Court found, to delve into 96 separate and redundant inquiries as the government suggested.[19]

II. This Petition should be granted to resolve the split in the circuits regarding the narrow exception to collateral estoppel for a "change in the law."

Issue Preclusion

If for some reason *res judicata* is thought not to apply, barring relitigation to title to the entire 180,000 acres, then it seems imminently clear that collateral estoppel does apply. However, the Fifth Circuit found two reasons why collateral estoppel did not apply: one contrived by the government, and one based on the Fifth Circuit's substantially expanded "exception" to the usual collateral estoppel rule that effectively vitiates the rule. 365 F.3d 385, 397-398. The Third Circuit rejected a virtually identical proposed exception, finding the exception would "swallow . . . the rule." *O'Leary v. Liberty Mutual Ins. Co.*, 923 F.2d 1062, 1067 (3d Cir. 1991). The Fifth Circuit's new rule allows any change in the law to defeat collateral estoppel.

The previous Fifth Circuit law on collateral estoppel was fairly mainstream. "Collateral estoppel depended on three elements: (1) the issue at stake must be identical to the one involved in the prior action; (2) the issue must have been actually litigated in the prior action; and (3) the determination of the issue in the prior action must have been a necessary part of the judgment in that earlier action." *Recoveredge, L.P. v. Pentecost*, 44 F.3d 1284, 1290 (5th Cir. 1995). Some cases list a fourth element: "there is no special circumstance that would render preclusion inappropriate or unfair." *See, e.g., United States v. Shanbaum*, 10 F.3d 305, 311 (5th Cir. 1994). The government, however, argued that an exception should be engrafted onto this general rule.

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19. "This Court does not believe that 96 separate or mini trials are necessary for the resolution of the issue of *res judicata*." *Petro-Hunt*, 179 F. Supp. 2d at 676.

The Change in the Law

The government argued, and the Fifth Circuit found, that *United States v. Little Lake Misere Land Co., Inc.*, 412 U.S. 580 (1973)[20] changed the prevailing law insofar as it held that Act 315 of 1940 could not be constitutionally applied to defeat the government's claim of prescription of non-use where the government had purchased property in Louisiana pursuant to the Migratory Bird Act. Thus, the asserted "change" arose from the government's own prior litigation. In *Little Lake*, this Court distinguished the *Nebo* case on its facts, and in so doing the Court stated:

> The Court of Appeals [in the *Nebo* case] also emphasized that officials of the Department of Agriculture had represented to the government's vendor that "the prescriptive provisions of the Louisiana Civil Code would not apply to lands sold to the United States for National Forest purposes." [citations omitted] The Court of Appeals noted that the price paid by the government did not reflect the value of any mineral rights and that the vendor would not have agreed to the land sale absent the government's representation that Louisiana prescription law would not apply.

412 U.S. at 586 n.4.

Thus, this Court recognized the fact driven nature of the *Nebo* litigation. The *Little Lake* case does not overrule *Nebo*. *See Cent. Pines Land Co. v. United States*, 274 F.3d 881, 889 (5th Cir. 2001). *See also Little Lake*, 412 U.S. at 606. While the law may have changed, the facts have not. The new rule from *Little Lake*, applied to the *Nebo* facts, would not change the result in *Nebo*. The rationale of *Little Lake* was that pursuant to the *Clearfield Trust* doctrine, Act 315 of 1940

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20. Judge Walter, the District Judge in this case was the U.S. Attorney for the government before the District Court and the Fifth Circuit in *Little Lake*. With this background, his opinion should have been given great deference, yet the Fifth Circuit ignored his findings of fact and conclusions of law.

was "aberrant or hostile" to the government since it deprived the government of its "bargained for contractual rights," presumably to eventually acquire the minerals. *Little Lake*, 412 U.S. at 595-97. However, in *Nebo*, not only did the government not bargain for the minerals, the *Nebo* court found the government did not intend to buy the minerals, and did not pay for them, and did not need the minerals for national forest purposes. *Nebo*, 190 F.2d at 1005-1010. Thus, it cannot be successfully argued that, given these facts, Act 315 of 1940 is "aberrant or hostile" to the government because the government is not deprived of anything for which it bargained.

The government's arguments that *Little Lake* changed the law with respect to application of Act 315 of 1940, as a matter of *stare decisis*, may be true; however, this case is not about *stare decisis*, but about *res judicata* and collateral estoppel. It is well established that a party who has lost in federal civil litigation cannot relitigate the very same case years later just because the underlying constitutional provision [in this case the Contract Clause] has "evolved." *See* Wright & Miller, *supra*, § 4415 at 369-370 (2002). ("Change in the controlling principles of law ordinarily does not warrant denial of claim preclusion"). *See also Tomlin v. McDaniel*, 865 F.2d 209 (9th Cir. 1989); *United States v. Real Prop. Described at 3947 Locke Ave.*, 164 F.R.D. 496 (C.D. Calif. 1995).

Nevertheless, the government sought to use the change in precedent to invoke what has heretofore been a narrow exception to the collateral estoppel rule based on a change in the prevailing law pursuant to *Restatement (Second) of Judgments*, § 28(2) (1982), or an "unmixed question of law" (as opposed to a mixed question of law and fact) pertaining to "unrelated subject matter." *United States v. Stauffer Chem. Co.*, 464 U.S. 165, 169 (1984); citing *United States v. Moser*, 266 U.S. 236, 242 (1924): As Justice Rehnquist explained:

> As commonly explained, the doctrine of collateral estoppel can apply to preclude relitigation of both issues of law and issues of

> fact if those issues were conclusively determined in a prior action. [citations omitted] Our cases, however, recognize an exception to the applicability of the principles of collateral estoppel for "unmixed questions of law" arising in "successive actions involving unrelated subject matter." *Montana v. United States, supra,* 440 U.S. at 162. [other citations omitted] . . . While our discussion in *Montana* indicates that the exception is generally recognized, we are frank to admit uncertainty as to its application. The exception seems to require determination as to whether an "issue of fact" or an "issue of law" is sought to be relitigated and then a determination as to whether the "issue of law" arises in a successive case that is so unrelated to the prior case that litigation of the issue is unwarranted. Yet we agree that, for the purpose of determining when to apply an estoppel,
>
> > [w]hen the claims in two separate actions between the same parties are the same or closely related . . . it is not ordinarily necessary to characterize an issue as one of fact or of law for purpose of issue preclusion . . . . in such a case, it is unfair to the winning party and an unnecessary burden on the courts to allow repeated litigation of the same issue in what is essentially the same controversy, even if the issue is regarded as one of "law." *Restatement (Second) of Judgments, § 28, comment b (1982).*

464 U.S. at 171.

In *Stauffer*, this Court rejected the government's arguments calling for a broader exception based on a change in the law. 464 U.S. at 172 n.5. Comment b to § 28 of the *Restatement (Second) of Judgments*, continues by saying:

> Thus, if a corporation issues a series of notes for the repayment of a loan, and the holder of the

> notes brings an action on one of them, and the corporation's defense that issuance of the notes was ultra varies is rejected by the court, the judgment is conclusive on that issue in a subsequent action on another of the notes.

It is logically difficult, if not impossible, to distinguish between identical corporate notes and identical conveyance instruments.

Contrary to the obviously limited role this Court found the exception (or exceptions)[21] plays, the Fifth Circuit stated: "In this Circuit, collateral estoppel applies to 'pure questions of law' only when there has been no 'change in controlling legal principles.'" 365 F.3d at 397.

A Split in the Circuits

Such a broad rule was specifically considered by the Third Circuit, and rejected.

> Even if there were a settled change in the law .... we still would be unable to give the O'Learys the benefit of the evolving jurisprudence by permitting them to relitigate the issue [auto insurance issue]. Contrary to the O'Learys' assertion, § 28(2)(b) does not stand for the proposition that an issue, once litigated and resolved, may be reopened whenever the governing law changes or clarifies. Such a broad exception would swallow the general rule, greatly undermining the twin goals of collateral estoppel -- the avoidance of repetitive litigation and the promotion of finality of judgments.

O'Leary v. Liberty Mutual Ins. Co., 923 F.2d 1062, 1069 (3d Cir. 1991).

The Fifth Circuit has not fully addressed the exception for a change in the law and the revised opinion does not

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21. Some cases suggest there are two exceptions for changing law rather than one. The *Stauffer* exception should apply whether the law has changed or not changed. *Stauffer* and the *Restatement*, § 28(2), should be reconciled, or the *Restatement* rejected. Only this Court can do so.

fully discuss the matter either. However, other circuits have. In *O'Leary*, the Third Circuit held that the "unrelated subject matter" aspect of *Stauffer* and *Restatement (Second) of Judgments*, § 28(b), was also a prerequisite to the "change in the law" exception. *See* 923 F.2d at 1069. In *O'Leary*, the plaintiff had been injured in an automobile accident while driving a company owned vehicle. The state law allowed him only to recover worker's compensation benefits, and denied him the right to pursue the employer's uninsured motorist coverage. Subsequently, several cases suggested a change which would allow injured workers to pursue uninsured motorist claims. Based on those cases, O'Leary filed another suit seeking to invoke the new law. The court held that if there was a change in the law it could not benefit *O'Leary*, since the second case did not involve "unrelated subject matter," but involved the same subject matter. The court said "unrelated subject matter" would require a subsequent automobile accident. 923 F.2d at 1069. *See also Burlington N. R.R. v. Hyundai Merch. Marine, Co., Ltd.*, 63 F.3d 1227 (3d Cir. 1995), which also addresses the "unrelated subject matter" aspect of *Stauffer*. A split has occurred because the Fifth Circuit ignored this prong of *Stauffer*.

In *Burlington*, one of the litigants suggested that *Stauffer* had rejected or overruled the exception. The Third Circuit found that the exception survived, but refused to apply the exception in that case. The court referred to reservations about *Stauffer*, and seemed to tacitly ask for further elucidation from this Court about this rather limited exception:

> [I]t remains unclear just where the court's opinion [*Stauffer*] will lead. It is confessed that there is no clear sense of the purpose that may limit preclusion as to matters of law. No attempt is made to work through the difficult policies that may apply in different settings, so as to push preclusion closer to abstract issues of law or to confine it closer to commingled issues of law and common fact.

Burlington, 63 F.3d at 1235, 1239, and n.10, quoting from Wright & Miller, *supra*, § 4425 at 198 (1994); *accord O'Leary*, 923 F.2d at 1067 ("proper application of § 28(2)(b) is largely unplumbed by the case law").

The case of *Steen v. John Hancock Mut. Ins. Co.*, 106 F.3d 904 (9th Cir. 1997), appears to be generally in accord with *O'Leary* and *Burlington*. The D.C. Circuit and the Eleventh Circuit also apply the "change in the law" exception differently from the Fifth Circuit. *See Beverly Health & Rehab. Servs., Inc. v. Nat'l Labor Relations Bd.*, 317 F.3d 316, (D.C. 2003); *Precision Air Parts, Inc. v. AVCO Corp*, 736 F.2d 1499 (11th Cir. 1984), *cert. denied*, 469 U.S. 1191 (1985). *See also N. Ga. Elec. Membership Corp. v. City of Calhoun*, 989 F.2d 429 (11th Cir. 1993).

Here all of the facts were in existence and established prior to the first litigation. The operative facts, i.e. the various conveyances, have never changed. The subject matter is, thus, the same.[22] *See also* Wright & Miller, *supra*, § 4425 (2002).

Another Red Herring Misled the Fifth Circuit

Not only did the government argue that *Little Lake's* "change in the law" should be applied to defeat collateral estoppel, but the government also disingenuously suggested the "threshold choice of law issue" from *Little Lake* constituted an issue that had not been litigated in *Nebo*, thus bootstrapping the "change in the law" into what it characterized as an unlitigated issue. Government Fifth Circuit Brief at 43.

It is evident that what the government described as a "threshold choice of law issue" from *Little Lake* is the same

22. As noted by Judge Walter, the drilling histories of the property are of no importance with respect to application of Act 315. *Petro-Hunt v. United States*, 179 F. Supp. 2d 669, 676 (W.D. La. 2001). The Fifth Circuit's decision vacillates on the matter. First the decision describes the drilling histories as "most important" (Fifth Circuit opinion, p. 21) and several pages later concedes that with respect to application of Act 315, the drilling histories were irrelevant. (Panel Opinion, p. 24). App. A, p. 22a; 24a; B, p. 50a, 53a.

as the "change in the law" per *Restatement (Second) of Judgments*, § 28(2). No one, including the government, knew that the so called "threshold choice of law issue" existed until this Court decided *Little Lake*. The "threshold choice of law issue" the government insisted had to be addressed is nothing more than a reconstruction of the arguments the government originally made in *Nebo*. *See* Government Brief in *Nebo*. App. J, p. 128a. When the government filed the *Nebo* case it sought to litigate the "claim" of title. "[I]t is settled that a "claim" for purposes of the rule [preclusion] means all legal theories bearing on a set of facts; an omitted argument cannot be raised later." *United States v. County of Cook, Ill.*, 167 F.3d 381, 385 (7th Cir. 1999), *cert. denied*, 528 U.S. 1019 (1999).[23] It is circular for the government to argue that it did not have a chance to litigate the newly minted rule, and that therefore the "issue," i.e, the new rule of law, was not decided in the prior case. By definition the "new law" would never have been "decided" in a prior case.

Actually, the issue of whether state or federal law applied was essential to the court's determination in *Nebo*. Regardless of the manner in which the government originally presented its choice of law argument, the District Court did make a choice of law analysis. A litigant should not be allowed to disturb a final judgment simply by employing a more refined or sophisticated incarnation of arguments previously put before the court.

That the *Nebo* court did, of necessity, made a choice of law determination, whether state or federal law should apply, is evident from the following:

> Where the United States has not acquired exclusive jurisdiction, or, stated conversely, where the United States and a state have concurrent jurisdiction, the Supreme Court has

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23. The Court in *Cook County* referred to a "claim" but cited, in support of this proposition, *Stauffer* and *Mendoza*, usually associated with issue preclusion; the court also referred to *Nevada* and *United States v. Moser*, 266 U.S. 236 (1924). This mixture of cases highlights the overlap between claim and issue preclusion.

> repeatedly upheld State legislation which does not interfere with the purpose for which the land was acquired by the United States.

Nebo, 90 F. Supp. at 85.

Having established the concurrent jurisdiction of both state and federal governments in the dispute, the court turned to the second half of its analysis: which law should apply, and whether Act 315 of 1940 was hostile to the federal government's contractual interests. The Court found:

> Where the jurisdiction of the United States is *concurrent* with the jurisdiction of the state, however, as is the case where lands have been acquired under the Weeks Law, it is uniformly held that the state statutes enacted after the land is acquired are applicable unless they interfere with the purpose for which the land was acquired by the United States.

90 F. Supp. at 88. (emphasis in the original)

In its brief before the Fifth Circuit in *Nebo*, the government made a choice of law argument and their brief even has a reference to the *Clearfield Trust* decision. *See* Brief of the United States before the District Court in *Nebo Oil*, p. 10 (filed February 24, 1950). *See* App. J, p. 128a.[24] Thus, the "threshold choice of law issue" is another false trail.

The Fifth Circuit's Analysis Was Incomplete

In its original opinion, dated March 31, 2004, the Fifth Circuit had relied on *Society of Separationists v. Herman*, 939 F.2d 1207 (5th Cir. 1991), for its sweeping "change in the law" exception. App. B, p. 53a. Petitioners pointed out in their Petition for Rehearing that this opinion in *Society* had

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24. Even if the underlying case is thought to be incorrectly decided, "[a] fact question or right distinctly adjudged in the original action cannot be disputed in a subsequent action, even though the determination was reached upon an erroneous view or by an erroneous application of the law." *Montana v. United States*, 440 U.S. 147, 162 (1979) (citing and quoting from *United States v. Moser*, 266 U.S. 236, 242 (1924)). The issues resolved in *Nebo* must be given preclusive effect. *See also O'Leary v. Liberty Mutual Ins. Co.*, 923 F.2d 1062 (3rd Cir. 1991).

previously been vacated when the Fifth Circuit granted rehearing *en banc*.[25] The Court denied the requests for panel rehearing and rehearing *en banc*, but nevertheless issued a virtually identical revised opinion withdrawing reference to the vacated *Society of Separationists* case. In its place the court cited *Hicks v. Quaker Oats Co.*, 662 F.2d 1158 (5th Cir. Unit A Dec.1981) (which found that the "change in the law" exception did not apply). The Court also cited *Montana v. United States*, 440 U.S. 147 (1979), *Comm'r of Internal Revenue v. Sunnen*, 333 U.S. 591 (1948) and other authority.[26] However, what is conspicuously absent is any meaningful discussion of *Stauffer*. The Fifth Circuit said the government was not relying on the "unmixed question of law" pertaining to "unrelated subject matter" exception from *Stauffer*, 365 F.2d at 397 n.63. The opinion seems to suggest that there is a difference between a "pure question of law", and an "unmixed question of law." Moreover, the Fifth Circuit's decision is clearly in conflict with the Third Circuit's requirement that the second suit must involve "unrelated subject matter" in order for the "change in the law" exception to apply. *O'Leary*. 923 F.2d at 1067.

Additionally, the Fifth Circuit failed to realize that the issue of constitutionality of Act 315 of 1940 was a mixed question of fact and law, and not a "pure question of law." The *Nebo* court did not find Act 315 of 1940 to be constitutional in a vacuum.

The present Fifth Circuit decision relies on a purported exception to collateral estoppel based on any change in the prevailing law. This identical concept was specifically rejected by the Third Circuit in *O'Leary*. Further, as noted in *O'Leary*, the Fifth Circuit's version of the exception would "greatly undermine the . . . goals of collateral estoppel." 923 F.2d at 1067. This Court should grant *certiorari* to resolve this conflict in the circuits and avoid this harmful result.

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25. *See Castle Hills First Baptist Church v. City of Castle Hills*, 2004 WL 546792 (W.D. Tex. 2004); *Littlefield v. Forney Indep. Sch. Dist.*, 108 F. Supp. 2d 681, 705 n.9 (N.D. Tex. 2000); 5th Cir. Local R. 41.3.

26. Reliance on *Sunnen* was misplaced. *Stauffer* limits *Sunnen* to tax cases. 464 U.S. at 579 n.5.

III. If this decision of the Fifth Circuit is allowed to stand then the United States government will have acquired valuable mineral property without paying for it, in violation of the just compensation clause of the Fifth Amendment to the United States Constitution.

There was a judicial determination fifty years ago that the United States did not pay for 180,000 acres of mineral property, but only paid for the surface. *See Nebo, supra,* 79 F. Supp. at 89-90, *aff'd.*, 190 F.2d at 1005-1006. The Fifth Circuit in this case has determined that the mineral property is subject to the Louisiana rules of prescription.

If the Fifth Circuit decision becomes final, the government will immediately be vested with title to approximately 58,000 mineral acres (area not held by use). Thus, the Fifth Circuit has held, in two separate lawsuits, that the government has not paid for the mineral interests that the Fifth Circuit now says it owns.

Because the Fifth Circuit has established that the government has not paid any compensation, just or otherwise, for this mineral property, the government should pay petitioners. Petro-Hunt, has, in fact, filed a suit in the United States Court of Federal Claims to recover just compensation for this property in the event the Court rules Petitioners do not have title to the property.[27] Petro-Hunt also seeks damages for the lease of its mineral property by the government. If the judgment of the Fifth Circuit is allowed to become final, Petro-Hunt will pursue its Court of Claims remedy against the government for what is, in effect, a judicially sanctioned inverse condemnation of its mineral rights. *See, e.g., Kirby Forest Indus., Inc. v. United States,* 467 U.S. 1 (1984).

CONCLUSION

For the reasons stated above, this Court should grant this Petition to resolve the split among the circuits regarding these significant issues of *res judicata* and collateral estoppel, and to prevent any more rogue decisions about such basic judicial principles.

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27. This case is styled *Petro-Hunt, L.L.C. v. United States,* United States Court of Federal Claims No. 00-512L. The case is presently stayed, pending the outcome of the instant case.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED MARCH 31, 2004 REVISED MAY 28, 2004

REVISED May 28, 2004

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Nos. 02-30760 c/w
02-30786

PETRO-HUNT, L.L.C.; et al.,

Plaintiffs-Appellees,

VERSUS

UNITED STATES OF AMERICA, et al.,

Defendants,

UNITED STATES OF AMERICA,

Defendant-Appellant.

PETRO-HUNT, L.L.C., et al.,

Plaintiffs-Appellants,

versus

UNITED STATES OF AMERICA, et al.,

Defendants-Appellees.

Appendix A

Appeals from the United States District Court
for the Western District of Louisiana

Before EMILIO M. GARZA and DENNIS, Circuit Judges, and VANCE*, District Judge.

DENNIS, Circuit Judge:

Petro-Hunt, L.L.C., Hunt Petroleum Corporation, and Kingfisher Resources, Inc., (collectively "Plaintiffs") filed a declaratory judgment action seeking to quiet title to mineral rights in approximately 180,000 acres of federally owned land within the Kisatchie National Forest. Plaintiffs claim those rights as successors in interest to 96 mineral servitudes that were created before the United States purchased the land in the 1930s. The district court granted summary judgment in favor of Plaintiffs on the grounds of *res judicata* and denied Plaintiff's request for attorneys' fees. The United States timely appeals the district court's grant of summary judgment and Plaintiffs cross-appeal on the issue of attorneys' fees. Because we reverse district court's summary judgment ruling and remand for further proceedings not inconsistent with this opinion, we need not reach the merits of Plaintiffs' cross appeal regarding attorneys' fees since plaintiffs are no longer prevailing parties.[1]

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* District Judge of the Eastern District of Louisiana, sitting by designation.

1. Prevailing party status is a prerequisite to recovering attorneys' fees under 28 U.S.C. § 2412(b).

Appendix A

I. BACKGROUND

In order to give the proper context to our discussion of the merits of this factually dense case, we begin with a brief discussion on Louisiana mineral law, the servitudes in question, and the applicability of certain Louisiana laws to property owned by the United States.

A. *Mineral Servitudes Under Louisiana Law*

Louisiana law governing mineral servitudes does not recognize a separate mineral estate in oil and gas.[2] Mineral rights can be owned separate from the surface land only in the form of a mineral servitude.[3] Hence, any attempt to sell or reserve the ownership of oil and gas results in the creation of a mineral servitude, and the holder of that servitude has the right to enter the property and extract the minerals.[4] Louisiana law has long provided that a mineral servitude is extinguished by prescription resulting from ten years'

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2. *Frost-Johnson Lumber Co. v. Salling's Heirs*, 91 So. 207, 243-245 (1920).

3. *Central Pines Land Co. v. United States*, 274 F.3d 881, 884 (5th Cir.2001).

4. *Central Pines*, 274 F.3d at 884. *See* La. R.S. § 31:21 ("A mineral servitude is the right of enjoyment of land belonging to another for the purpose of exploring for and producing minerals and reducing them to possession and ownership."); *see also* Luther L. McDougal, III, *Louisiana Mineral Servitudes*, 61 TUL. L. REV. 1097, 1098-99 (1987).

nonuse.[5] The period of prescription on mineral servitudes begins to run on the date a servitude is created,[6] and is interrupted only by "good faith operations for the discovery and production of minerals."[7]

Because the rule of prescription reflects a public policy favoring "the timely return of outstanding minerals to the owner of the land,"[8] the rule may not be abrogated by contract.[9] The Louisiana Supreme Court has declared that "it is against the public policy of this state to allow . . . servitudes to remain alive for a longer period than 10 years without use," and that any contracts to the contrary are void as against public policy.[10]

B. *Creation of Mineral Servitudes*

In 1932, five Louisiana lumber companies—Good Pine Lumber, Trout Creek Lumber, Tall Timber Lumber, Bodcaw

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5. *Central Pines,* 274 F.3d at 884. *See* La. R.S. § 31:27.

6. *See* La. R.S. § 31:28; *see also Ober v. Williams,* 35 So.2d 219, 224 (1948).

7. La. R.S. § 31:29.

8. *See Mire v. Hawkins,* 186 So.2d 591, 597 (1966).

9. *See Leiter Minerals, Inc. v. California Co.,* 132 So.2d 845, 853 (1961). On the other hand, agreements to shorten the period of prescription do not conflict with public policy and are valid. *Id.*

10. *Id.*

Lumber, and Grant Timber—entered an agreement to pool the mineral rights on their respective land holdings in central Louisiana.[11] As part of the pooling agreement, the companies created a joint venture called the "Good Pine Oil Company" and separately conveyed to that company the rights to explore and develop their property for the production of oil, gas, and sulphur.[12] Of these conveyances, six that Bodcaw Lumber and Grant Timber made to Good Pine Oil between November 12, 1932, and May 3, 1934, are relevant to this case. All of these six conveyances involved multiple parcels of land, many of which were non-contiguous, and thus resulted in multiple mineral servitudes.[13]

Each of the six deeds conveying mineral rights to Good Pine Oil contained a clause providing that the ten year period of liberative prescription applied. Five of the deeds expressly stipulated that "none of said [mineral] rights in any of said lands shall be prescribed *unless there shall elapse a full period of ten (10) years in which there shall be no exercise of any of the foregoing rights or user of any of the lands* aforesaid under and by virtue hereof." The sixth contained

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11. *United States v. Nebo Oil,* 190 F.2d 1003, 1005 (5th Cir.1951).

12. *Id.*

13. *See Cox v. Sanders,* 421 So.2d 869, 873 (1982) (stating that "a landowner cannot create a single servitude or mineral royalty right on two or more non-contiguous tracts; and if this is attempted by a single instrument, there are nevertheless as many servitudes or royalty interests as there are non-contiguous tracts of land" and quoting *Whitehall Oil Co. v. Heard,* 197 So.2d 672, 675 (La.Ct.App.1967)).

strikingly similar language. Because the prescriptive period described in these instruments is equivalent to the liberative prescription period of ten years, the contract provision applying a prescriptive period of ten years is enforceable.

C. *Acquisition by the United States*

In the late 1930s, the United States acquired approximately 180,000 acres of land in three Louisiana parishes (Grant Parish, Natchitoches Parish, and Winn Parish) from Bodcaw Lumber and Grant Timber for inclusion in the Kisatchie National Forest. The United States acquired the lands under the Weeks Forestry Act[14] through nine acts of sale and two judgments in condemnation.[15] Each of these eleven conveyances came after the six transactions in which Bodcaw Lumber and Grant Timber conveyed mineral rights on the lands to Good Pine Oil. Consequently, at the time of acquisition, the approximately 180,000 acres of land that the United States acquired was burdened by 96 separate mineral servitudes in favor of Good Pine Oil.

The eleven instruments of transfer (nine deeds and two judgments) conveying the lands to the United States addressed the pre-existing mineral servitudes in different ways. All but one of the instruments contained language stating that the conveyances were "subject to" one or more of the mineral deeds granting rights to Good Pine Oil. Most

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14. 16 U.S.C. § 515.

15. The record shows that the United States acquired the lands between November 28, 1934, and January 28, 1937.

of these transfer instruments contained an additional clause stating that the "mention" of the earlier mineral reservation was "made solely for the purpose of limiting vendor's warranty to the United States in present sale, and *the recital of the said Mineral Sale shall in nowise extend or enlarge the same in point of time.*"

Five of the instruments (four deeds and one judgment) also contained additional mineral reservations in the name of Bodcaw Lumber or Grant Timber, which were to become effective upon the prescription of the relevant servitudes held by Good Pine Oil. For example, the February 11, 1936 deed conveying 24,943.93 acres owned by Bodcaw Lumber "specially reserved" unto Bodcaw Lumber "all of the oil, gas and other minerals . . . subject to the sales to Good Pine Oil Company, Incorporated, for a period of ten years after the expiration of the rights of the said Good Pine Oil Company, Incorporated, under the laws of the State of Louisiana." This deed further provided that this "specially reserved" right would be extended beyond ten years if the right were exercised in a particular fashion, and that if the original ten year period or any extended period terminated for nonuse, "a complete fee in the land [would] become vested in the United States." The other four instruments also contained clauses granting reversionary mineral interests to Bodcaw Lumber or Grant Timber upon the prescription of the Good Pine servitudes.[16] Each of the instruments stated

16. Because the Good Pine servitudes were still in effect, the "reversionary" clauses were invalid. *See Liberty Farms v. Miller,* 45 So.2d 610, 614 (La.1950) ("One may not reserve reversionary rights to minerals when he is not the owner of the minerals at the

(Cont'd)

that at the termination of the reservations, the United States would hold the land in "complete fee."

D. ***Act 315***

In 1940, well after the mineral and land transactions described above were complete, the Louisiana Legislature passed Act 315 to eliminate the rule of prescription for mineral rights on lands held by the United States:

> [W]hen land is acquired by conventional deed or contract, condemnation or expropriation proceedings by the United States of America . . . , and by the act of acquisition, verdict or judgment, oil, gas, and/or other minerals or royalties are reserved, or the land so acquired is by the act of acquisition conveyed subject to a prior sale or reservation of oil, gas and/or other minerals or royalties, still in force and effect, said rights so reserved or previously sold shall be imprescriptible.[17]

The purpose of the Act was to facilitate the federal government's purchase of large tracts of land for National Forests, National Parks, military installations, and like

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(Cont'd)
time the reservation is made. It is settled that, in such instances, the reservation is ineffective and the outstanding mineral interests revert to the person owning the land at the time prescription accrues.").

17. *See* 1940 La. Acts 315; *see also* La. R.S. § 31:149.

purposes.[18] The United States was having difficulty acquiring such tracts in Louisiana because landowners who wished to retain mineral rights were reluctant to sell their land for fear of losing mineral reservations through prescription.[19] By making mineral servitudes on federal land "imprescriptible"—and thus "prevent[ing] the federal government from acquiring mineral rights by prescription"—Act 315 also served Louisiana's interest in taxing and regulating minerals on federal land, powers that would be in doubt should ownership of the minerals be vested in the United States.[20]

E. *Nebo Oil*

In 1948, the United States filed a declaratory judgment action against the Nebo Oil Company to quiet title to the minerals on a particular servitude claimed by Nebo Oil as successor in interest to Good Pine Oil.[21] The complaint referred to a specific parcel, approximately 800 acres in size, lying in portions of section 19 (Township 13 North, Range 6 West) and section 24 (Township 13, Range 7 West) in

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18. *See United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 599 & n. 16 (1973) (citing *Leiter Minerals*, 132 So.2d at 851).

19. *Leiter Minerals*, 132 So.2d at 851.

20. *Id.* at 851-52, 854; *see also Little Lake Misere*, 412 U.S. at 599-600 (citing *Leiter Minerals*).

21. Sometime after December 1941, Nebo Oil Company acquired all of the mineral rights formerly held by Good Pine Oil. *See Nebo Oil*, 190 F.2d at 1006.

Natchitoches Parish. This parcel was one of several parcels acquired by the United States through a February 11, 1936 deed from Bodcaw Lumber, which totaled 24,943.93 acres. Nebo Oil claimed a mineral servitude on the 800-acre parcel as a result of a November 12, 1932 conveyance of mineral rights from Bodcaw to Good Pine Oil.

In its complaint, the United States averred: (1) that no drilling operations had been conducted on the 800-acre parcel during the ten year period beginning on November 12, 1932; (2) that the mineral servitude on the parcel had therefore prescribed for nonuse; and (3) that Nebo Oil intended to drill a well on the land and had advised the government that the company would resist interference. To prevent injury to its property, the United States sought declaratory relief and an order permanently enjoining Nebo Oil from entering the 800-acre parcel for mineral production.

In denying the United States relief, the District Court for the Western District of Louisiana held that the 800-acre servitude had been rendered "imprescriptible" by Act 315.[22] This court affirmed that judgment.[23] First, this court found

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22. *See United States v. Nebo Oil,* 90 F.Supp. 73 (W.D.La.1950).

23. *See Nebo Oil,* 190 F.2d at 1003. The district court's final decree in *Nebo Oil* included a broad finding that the prescriptive periods of the Louisiana Civil Code "do not apply to lands purchased by the United States under the Weeks Act, as amended, for national forest purposes. . . ." The court further found that "under the terms of the deed from Bodcaw Lumber . . . to Good Pine Oil . . . dated November 12, 1932, and the deed from Bodcaw Lumber . . . to the

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that it was bound by Louisiana precedent holding that rules of prescription, including Act 315, "are retrospective in their operation."[24] Second, we held that Act 315's elimination of the rule of prescription as to servitudes on federal land did not dispose of federal property in violation of Article IV, Section 3, clause 2 of the United States Constitution or violate the Contract Clause of the Constitution or the Due Process Clause of the Fourteenth Amendment. The apparent reasoning was that the United States's interest in reclaiming the mineral rights through prescription was not a vested right at the time Act 315 was passed because the Good Pine servitudes had been created less than ten years earlier.[25]

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United States of America dated February 11, 1936, the oil, gas and sulphur in, on and under the lands conveyed to the United States under such deed . . . , which deed covered the lands herein involved, were vested in perpetuity in Good Pine Oil . . . , its successors and assigns, and, through it, in the defendant herein, as its successor in interest." Despite the breadth of these findings, the district court returned to the property that was actually before it when it concluded its decree: "IT IS NOW ORDERED, ADJUDGED AND DECREED that the oil, gas, and sulphur in, on and under the lands described in the complaint are vested in perpetuity in Nebo Oil Company, Inc., its successors and assigns."

24. *See Nebo Oil,* 190 F.2d at 1008 (citing *Whitney Nat'l Bank of New Orleans v. Little Creek Oil Co.,* 212 La. 949, 33 So.2d 693 (1947)).

25. *See id.* at 1008-10; *see also id.* at 1008 ("It cannot be considered a vested right if it is nothing more than a mere expectation, or hope, based upon an anticipated continuance of the applicable general laws.").

F. *After Nebo Oil*

Subsequent to our decision in *Nebo Oil,* there were two decisions concerning the retroactive applicability of Act 315 to mineral servitudes located on property owned by the United States. First, in *United States v. Little Lake Misere Land Company,* the government sued to quiet title in two adjacent parcels of land in Cameron Parish, Louisiana, which it had acquired under the Migratory Bird Conservation Act.[26] The instruments of acquisition—a 1937 deed and a 1939 judgment in condemnation—reserved to Little Lake Misere oil, gas, sulphur, and other minerals for a period of ten years from the date of vesting of title in the United States.[27] But those instruments further provided that if the initial ten year period ended and no production was occurring, or if operations subsequently ceased for more than sixty days, "the right to mine, produce and market said oil, gas, sulphur or other mineral shall terminate . . . and the complete fee title to said lands shall thereby become vested in the United States."[28] Nevertheless, following the enactment of Act 315, the servitude holder, Little Lake Misere, asserted that the reservations had become "imprescriptible."

In a brief per curiam opinion, this court held in favor of the servitude holder, finding that the contractual terms of prescription did not apply to the servitudes in question in

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26. 412 U.S. at 582.

27. *Id.*

28. *Id.* at 583.

the light of Act 315.[29] This holding was based on our prior decision in *Nebo Oil* regarding the constitutionality of the retroactive application of Act 315.[30]

But the United States Supreme Court granted certiorari and reversed.[31] In so doing, the Court did not expressly reject our interpretation of Louisiana law or the analysis of Act 315's constitutionality in *Nebo Oil.* Instead, invoking the choice-of-law doctrine of *Clearfield Trust Co. v. United States,*[32] the Supreme Court held that this court erred in presuming, as a threshold matter, that Louisiana state law applied.[33] Furthermore, because *Little Lake Misere* involved a determination of rights under a land acquisition agreement that was "explicitly authorized, though not precisely governed, by the Migratory Bird Conservation Act" and "to which the United States itself is a party," the Supreme Court held that it was for the federal courts to "fashion" the governing rule of law in that case.[34] Determining that Act 315 would deprive the United States of "bargained-for-

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29. *See United States v. Little Lake Misere Land Co.,* 453 F.2d 360 (5th Cir.1971).

30. *Id.* at 362.

31. *See United States v. Little Lake Misere Land Co.,* 318 U.S. 363 (1943).

32. 318 U.S. 580 (1943).

33. *See Little Lake Misere,* 412 U.S. at 591.

34. *See id.* at 594.

contractual interests" by abrogating the terms of the acquisition instruments relating to prescription, the Supreme Court held that the Act was "plainly hostile to the interests of the United States" and could not be "borrowed" as the rule of decision.[35] Finally, the Supreme Court held that the appropriate rule of decision was to be supplied by either federal common law or "residual" state law (*i.e.*, state law without Act 315), both of which would give effect to the contract terms.[36]

The second decision pertinent here was *Central Pines Land Company v. United States.*[37] In that case, we were called upon to revisit our *Nebo Oil* ruling in the light of the Supreme Court's opinion in *Little Lake Misere.*[38] The facts of *Central Pines* were quite similar to those of *Nebo Oil.* First, like *Nebo Oil, Central Pines* involved the acquisition of land by the United States in the 1930s for the Kisatchie National Forest.[39] Second, also like *Nebo Oil,* the lands so acquired were subject to a preexisting mineral servitude.[40] Finally, the successor in interest to the servitude owner also argued that Act 315 had rendered the servitude in *Central Pines* "imprescriptible."[41]

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35. *Id.* at 596.

36. *Id.* at 604.

37. 274 F.3d 881.

38. 274 F.3d at 881.

39. *See id.* at 885.

40. *Id.*

41. *Id.* at 886.

Despite the factual similarities between *Central Pines* and *Nebo Oil,* and perhaps taking a cue from the Supreme Court's *Little Lake Misere* decision, this court ruled that Act 315 did not apply to *Central Pines.*[42] While we declined to expressly overrule *Nebo Oil*'s constitutional analysis, we also rejected the presumption in *Nebo Oil* that Louisiana law governed the terms of the transactions at issue.[43] In particular, following the analysis of *Little Lake Misere,* this court held that the right asserted by the United States—*i.e.,* the right to reclaim mineral interests through prescription—was a right acquired through a duly authorized federal land acquisition agreement and, therefore, that federal choice-of-law principles applied.[44]

Applying these principles, the *Central Pines* court determined that Act 315 could not be borrowed as the rule of decision because, as in *Little Lake Misere,* it was hostile to the government's contractual interests in reclaiming minerals through the "legal rules in place at the time of contract."[45] While acknowledging that this interest was "arguably not as powerful as the federal right to enforce explicit contractual terms" (the right at stake in *Little Lake Misere*), we determined that this interest outweighed any state interest in applying Act 315.[46] Noting that the "main

42. 274 F.3d at 886.

43. *Id.* at 889-90.

44. *Id.* at 888-90.

45. *Id.* at 891.

46. *Id.* at 891-92.

justification" for Act 315 was to facilitate federal land acquisitions, this court observed that "[such] justification has no bearing on retroactive application of Act 315, because an acquisition cannot be facilitated by a law not yet in existence."[47] Finally, in recognition of the federal interest in the general rule of prescription, we also determined that the proper rule of decision was "residual" state law, *i.e.*, Louisiana law without Act 315.[48]

G. *The Present Dispute*

In the 1990s, the United States began granting mineral leases on certain Forest Service lands that had been burdened by Good Pine servitudes but were not involved in *Nebo Oil.* The government regarded these servitudes as prescribed for ten years' nonuse. In determining that the servitudes were subject to the rule of prescription, rather than Act 315, the United States relied on the Supreme Court's ruling in *Little Lake Misere.*

In response to this leasing activity, the Plaintiffs, who are successors in interest to Nebo Oil Company, initiated this declaratory judgment action on February 18, 2000. Their complaint named the United States and various parties to whom the United States granted mineral leases or offers to lease on lands that are or were burdened by Good Pine servitudes as defendants. Plaintiffs sought a ruling declaring that they are the owners, in perpetuity, of those servitudes

47. *Id.* at 892 (citing *Little Lake Misere,* 412 U.S. at 599).

48. *Id.*

and that the mineral leases and offers to lease issued by the United States were therefore null and void. The United States argued in response to the Plaintiffs' complaint that the 95 separate mineral servitudes through which the Plaintiffs claim mineral rights are subject to prescription for nonuse and that the relevant leases and offers to lease relate to lands on which the servitudes claimed by Plaintiffs have already prescribed.

Plaintiffs filed a motion for summary judgment[49] in the district court. In their motion, Plaintiffs argued that they were entitled to judgment as a matter of law because *Nebo Oil* and the doctrine of *res judicata* or collateral estoppel[50] would

49. Plaintiffs actually filed two motions for summary judgment. In their second summary judgment motion, Plaintiffs argued that even if the rule of prescription applied, five servitudes burdening nearly seventy percent of the 180,000 acres in dispute had not prescribed because they had exercised their rights through continuous drilling operations. The United States conceded that sufficient drilling operations had interrupted the running of prescription on some of the servitudes and introduced evidence regarding the particular histories of each of the 96 Good Pine servitudes. But the district court dismissed this second motion as moot due to its *res judicata* determination and expressly declined to consider the issue of whether sufficient drilling operations interrupted the prescriptive period as to any particular servitude. Because we reverse the district court's grant of summary judgment and because the district court has not had an opportunity to pass on the question of what servitudes may have prescribed, we will not reach the merits of Plaintiffs' second motion and remand this issue to the district court.

50. Although Plaintiffs did not specifically use the term "collateral estoppel" in their motion for summary judgment, Plaintiffs' argument in favor on the motion was based on *res judicata*. "The rules of *res judicata* encompass two separate but linked

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bar any defense raised by the United States as to the prescriptibility of the servitudes. The United States opposed the Plaintiffs' motion for summary judgment.

H. *The District Court's Ruling*

On December 18, 2001, the district court issued a memorandum ruling granting the Plaintiffs' motion for summary judgment. Holding that *res judicata* barred the United States's asserted defenses to Plaintiffs' claim of ownership due to this court's decision in *Nebo Oil,* the district court declared that Plaintiffs were "the exclusive owners in perpetuity of the approximately 180,000 acres of mineral servitudes at issue in this case." The district court based its ruling on this court's decision in *Nebo Oil.* The court noted that the 800-acre servitude addressed in *Nebo Oil* burdened a parcel of land that the United States acquired in 1936 as part of a larger purchase of 24,943.93 acres and that all 24,943.93 acres were burdened by mineral servitudes that were owned in common with the 800-acre servitude. Because the *Nebo Oil* decision referred to the 24,943.93-acre transaction, the district court found that *Nebo Oil* "applied Act 315 of 1940 to the mineral reservation and sale of the 24,943.93 acre tract" and that "*res judicata* clearly applies" to disputes over the minerals on this tract.

(Cont'd)

preclusive doctrines: (1) true *res judicata* or claim preclusion and (2) collateral estoppel or issue preclusion." *See St. Paul Mercury Ins. Co. v. Williamson,* 224 F.3d 425, 436 (5th Cir.2002) (internal citation omitted). Because these two doctrines are separate, collateral estoppel will be analyzed separately in this opinion.

As for the remainder of the approximately 180,000 acres of land—acquired by the United States in ten additional transactions that were not specifically addressed in *Nebo Oil*—the district court found that *res judicata* was also applicable due to the factual similarity in the transactions. Specifically, because of the similarities in the transactions through which the United States acquired the lands and in the earlier transactions creating mineral servitudes on the land, the district court stated: (1) that "the entire 180,000 acres was similarly situated to the 800 acres at issue in *Nebo Oil*"; (2) that the United States had a "full and fair opportunity" (in *Nebo Oil*) to "litigate the application and constitutionality of Louisiana Act 315 to this mineral property"; and (3) that "[t]he government should not be allowed to litigate now that which it could have litigated 50 years ago."

Accordingly, the district court entered a final judgment on May 29, 2002. The United States timely appealed.

II. Analysis

The critical issue before this court focuses on whether the United States is precluded from challenging Plaintiffs' assertion of ownership over all 96 of the mineral servitudes arising from their status as successors in interest to Good Pine Oil. Because the district court granted summary judgment, we review that decision *de novo*.[51]

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51. *Central Pines*, 274 F.3d at 886.

Appendix A

A. *Res Judicata-A Claim Precluded by Sameness?*

"Claim preclusion, or *res judicata,* bars the litigation of claims that either have been litigated or should have been raised in an earlier suit."[52] The test for *res judicata* has four elements: (1) the parties are identical or in privity; (2) the judgment in the prior action was rendered by a court of competent jurisdiction; (3) the prior action was concluded by a final judgment on the merits; and (4) the same claim or cause of action was involved in both actions.[53] In this case, there is no dispute over the competency of the *Nebo Oil* court, the finality of its judgment in that case, or the sameness of the parties. The only dispute is whether this case involves the same claim or cause of action as *Nebo Oil.*

To determine whether two suits involve the same claim or cause of action, this court has adopted the transactional test of the Restatement (Second) of Judgments, § 24.[54] Under that test, the preclusive effect of a prior judgment extends to all rights the original plaintiff had "with respect to all or any

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52. *In re Southmark Corp.,* 163 F.3d 925, 934 (5th Cir.1999). *See Brown v. Felsen,* 442 U.S. 127, 131 (1979) ("*Res judicata* prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding.").

53. *Southmark,* 163 F.3d at 934.

54. *Id.* (citing *Southmark Properties v. Charles House Corp.,* 742 F.2d 862, 870-71 (5th Cir.1984)).

part of the transaction, or series of connected transactions, out of which the [original] action arose."[55]

> What factual grouping constitutes a "transaction", and what groupings constitute a "series", are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.[56]

"[T]he critical issue is whether the two actions under consideration are based on the *same nucleus of operative facts.*"[57]

Contending that this action is not based on the same nucleus of operative facts as the action in *Nebo Oil,* the United States points out that it initiated the *Nebo Oil* litigation in response to learning that Nebo Oil intended to conduct drilling operations on a particular 800-acre parcel of federal land under a mineral servitude that, in the view of the United States, had prescribed.[58] The operative facts of that

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55. Restatement (Second) of Judgments § 24(1) (1982).

56. *Id.* § 24(2).

57. *Southmark,* 163 F.3d at 934 (internal quotation and citation omitted).

58. The United States acknowledges that it is precluded, as a matter of *res judicata,* from re-litigating title to the 800-acre mineral servitude at issue in *Nebo Oil.*

action included: (1) the United States's purchase of the 800-acre parcel from Bodcaw Lumber on February 11, 1936; (2) the creation of the mineral servitude burdening that parcel in a November 11, 1932 conveyance from Bodcaw Lumber to Good Pine Oil; and, most importantly, (3) the history of use or nonuse of that servitude. In contrast, the United States argues that the rights asserted by the parties in this case depend on ten additional federal land acquisitions, five additional mineral conveyances to Good Pine Oil, and the drilling histories on 95 additional servitudes.

The district court found that it did not "need to delve into such matters as what constitutes contiguous tracts, the number of servitudes, and whether prescription of nonuse was interrupted by good faith operations for the discovery and production of minerals." The district court reasoned that it was "faced with what may be viewed as a primarily legal question." Because all of the Good Pine servitudes were similarly situated with respect to application of Act 315, the court did not expressly identify the operative facts of this case and *Nebo Oil* and determine that they were the same. Instead, the district court relied on the fact that *Nebo Oil* addressed a federal land acquisition and the similarity among that acquisition and the other ten acquisitions at issue here.

But the district court's reliance on the factual similarities among the various servitudes and land acquisitions was misplaced. As the United States correctly points out, these observations of factual similarity, although potentially relevant for purposes of collateral estoppel, are not relevant to *res judicata*. Collateral estoppel prevents parties from re-litigating the same issues conclusively determined between them in a previous action. Although similar in principle, true

res judicata is concerned with a sameness of operative facts. Neither the Plaintiffs nor the district court have identified a principle of *res judicata* that requires an owner of separate properties to litigate title to all of those properties in response to a threat to his right of full use and enjoyment of only one of them.[59] While an action to quiet title in one property may raise the same legal issues that would also be in question in an similar type of action involving a similarly situated property, the operative facts of the two actions would be distinct.

In this case, each of the Good Pine servitudes was a distinct real right under Louisiana law.[60] The *Nebo Oil* action involved one servitude burdening an 800-acre parcel of land and was filed in response to a threat to the United States's asserted right of full use and enjoyment of that land. The United States took the position that the servitude was subject to prescription and had prescribed, and therefore it had to show ten years' nonuse *of that particular servitude* to succeed on its claim. The existence and use histories of the

59. Like the district court, the Plaintiffs seize on the Supreme Court's statement in *Nevada v. United States*, 463 U.S. 110, 129 n. 10 (1983), that "[t]he policies advanced by the doctrine of *res judicata* perhaps are at their zenith in cases concerning real property, land and water." While this is certainly true, nothing in the *Nevada* opinion undermines the principle that the doctrine of res judicata does not bar a second action unless it is the "same cause of action" as the first one. *See id.* at 130 ("To determine the applicability of *res judicata* to the facts before us, we must decide first if the 'cause of action' which the Government now seeks to assert is the 'same cause of action' that was asserted [previously].").

60. *See* McDougal, *supra* note 4, at 1099.

other Good Pine servitudes were not operative facts of either the government's claim or Nebo Oil's defense to that claim. Although the reasoning of *Nebo Oil* that the Good Pine servitudes were imprescriptible due to Act 315-made the use histories irrelevant as a matter of law, each servitude remained a distinct real right. If *Nebo Oil* remains good law, this court's holding that Act 315 rendered the Good Pine servitudes imprescriptible is final and conclusive between the United States and the Plaintiffs as a matter of collateral estoppel. But *res judicata* is no bar to the United States's defense in this action because its claim with respect to each servitude depends on a unique set of operative facts. Thus, if the United States's defense of this action is limited, it would be limited only under collateral estoppel.

B. *Collateral Estoppel-An Issue Precluded by Prior Litigation?*

Collateral estoppel precludes a party from litigating an issue already raised in an earlier action between the same parties[61] only if: (1) the issue at stake is identical to the one involved in the earlier action; (2) the issue was actually litigated in the prior action; and (3) the determination of the issue in the prior action was a necessary part of the judgment in that action.[62] In this circuit, collateral estoppel applies to

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61. "Mutuality" is a prerequisite only when the party to be estopped is the United States. *See United States v. Mendoza*, 464 U.S. 154 (1984).

62. *Stripling v. Jordan Prod. Co.*, LLC, 234 F.3d 863, 868 (5th Cir.2000).

"pure questions of law" only when there has been no "change in controlling legal principles."[63] The United States contends that collateral estoppel does not apply in the present case because it seeks to raise issues that are not identical to the issues litigated in *Nebo Oil* and, in any event, there has been a change in controlling legal principles. We agree.

In ruling that the United States is precluded from re-litigating the applicability of Act 315 to the Good Pine servitudes, the district court did not specify what particular issues were actually litigated in *Nebo Oil.* But, as the United

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63. *See, e.g., Hicks v. Quaker Oats Co.*, 662 F.2d 1158, 1167 (5th Cir.1981) (discussing the effect of *Montana v. United States*, 440 U.S. 147 (1979) on the exception to collateral estoppel explained in *United States v. Sunnen*, 333 U.S. 591 (1948), and concluding that post-*Montana*, *Sunnen* stands only for the proposition that "estoppel would not apply where there had been a change in controlling legal principles between the two decisions."); *EEOC v. Am. Airlines, Inc.*, 48 F.3d 164, 170 (5th Cir.1995) (quoting *Montana*, 440 U.S. at 161, for the proposition that "a significant change in the legal climate may defeat collateral estoppel where modifications in controlling legal principles . . . could renders a previous determination inconsistent with the prevailing doctrine."); *RecoverEdge, L.P. v. Pentecost*, 44 F.3d 1284, 1291 (5th Cir.1995) (stating "As one treatise points out, however, 'courts have readily perceived that for purposes of preclusion, 'issues are not identical if the second action involves application of a different legal standard, even though the factual setting of both suits is the same,'" citing 18 Wright, Miller & Cooper, *Federal Practice and Procedure* § 4417, at 165 (footnote omitted) (quoting *Peterson v. Clark Leasing Corp.*, 451 F.2d 1291 (9th Cir. 1971); *Brister v. A.W.I.*, 946 F.2d 350, 354 n. 1 (5th Cir. 1991) (explaining that "not only the facts, but also the legal standard used to assess them, must be identical" and citing *Southern Pac. Transp. Co. v. Smith Material Corp.*, 616 F.2d 111, 115 (5th Cir.1980)).

States discusses in its brief, the question of Act 315's applicability to this case can be divided into three distinct sets of legal issues. First, there are threshold choice-of-law issues, including whether the rights arising out of the federal land acquisitions are governed by state law (including Act 315) or by federal law, and, if federal law governs, whether and what provisions of state law should be "borrowed" to provide the rules of decision.[64] Second, there are issues regarding the interpretation of Act 315 under state law, including the question whether Act 315 is to be applied retroactively. Finally, there are issues concerning whether applying Act 315 retroactively is constitutional. That these issues are distinct legal issues cannot be doubted after this court's ruling in *Central Pines*.[65]

Nebo Oil only addressed the latter two sets of issues.[66] That is, in *Nebo Oil,* this court assumed the applicability of Act 315, confined its analysis to an interpretation of the Act under state law, and determined that the Act did not violate the federal constitution.[67] In the present case, the United States does not seek to revisit the issues actually addressed in *Nebo Oil.* Instead, it seeks to raise the threshold choice-of-law issue that *Nebo Oil* did not address because it

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64. *See Little Lake Misere,* 412 U.S. at 590-604; *Central Pines,* 274 F.3d at 887-92.

65. *See* 274 F.3d at 889-90.

66. *See id.* (describing the scope of *Nebo Oil*).

67. *See id.*

was presumed. In particular, the United States contends that: (1) federal law governs the rights arising out of its acquisition of the lands at issue in this case;[68] (2) Act 315 may not be borrowed as the rule of decision because it is hostile to the United States's contractual interests;[69] and (3) the rule at the time of the contract (*i.e.*, the Louisiana rule of prescription) should govern.[70]

Because these questions of law are not "identical" to the issues raised in *Nebo Oil* and were not "actually litigated" in *Nebo Oil*, we find that the United States is not precluded, under collateral estoppel, from raising them in this case.[71] Although the Plaintiffs cite scattered portions of both the district court's opinion and the United States's brief in *Nebo Oil* in an effort to show that the choice-of-law issue was determined in that action, we stand by our prior finding in *Central Pines* that it was not.[72]

Nevertheless, even if the choice-of-law issue had been raised in *Nebo Oil*, changes in the controlling legal principles prevent the United States from being precluded from

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68. *See Little Lake Misere*, 412 U.S. at 594; *Central Pines*, 274 F.3d at 887-90.

69. *See Central Pines*, 274 F.3d at 890-92.

70. *See id.* at 892.

71. *RecoverEdge L.P. v. Pentecost*, 44 F.3d at 1290.

72. *See* 274 F.3d at 889-90.

litigating the issue in this case.[73] After the decisions in *Little Lake Misere* and *Central Pines,* it is clear that federal law governs the choice-of-law decision presented by the facts of this case. Hence, we are prohibited from borrowing Act 315 as the federal rule of decision because it is hostile to the federal interests at stake.[74]

III. Conclusion

Because neither *res judicata* nor collateral estoppel preclude the United States from challenging Plaintiffs' assertion of ownership over the mineral servitudes in question, we reverse the district court's grant of summary judgment. In addition, we find that the 95 servitudes that were not at issue in *Nebo Oil* are subject to the contractual provisions permitting prescription after ten years' nonuse. Accordingly, we remand this case so that the district court can determine which servitudes have in fact prescribed.

REVERSED AND REMANDED.

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73. The Plaintiffs' argument that the Supreme Court's decision in *United States v. Stauffer Chem. Co.*, 464 U.S. 165 (1984), compels a contrary conclusion is mistaken. In that case, there had been no change in controlling legal principles between the first and the second action. *See id.* at 170. The Court was concerned, instead, with the exception to the otherwise applicable rules of preclusion for "unmixed questions of law" arising in "successive actions involving unrelated subject matter." *See id.* The United States does not rely on this exception in this case.

74. *See Central Pines*, 274 F.3d at 888-90.

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED MARCH 31, 2004

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Nos. 02-30760 c/w
02-30786

PETRO-HUNT, L.L.C.; et al.,

Plaintiffs-Appellees,

VERSUS

UNITED STATES OF AMERICA, et al.,

Defendants,

UNITED STATES OF AMERICA,

Defendant-Appellant.

PETRO-HUNT, L.L.C., et al.,

Plaintiffs-Appellants,

versus

UNITED STATES OF AMERICA, et al.,

Defendants-Appellees.

Appendix B

Appeals from the United States District Court
for the Western District of Louisiana

Before EMILIO M. GARZA and DENNIS, Circuit Judges, and VANCE*, District Judge.

DENNIS, Circuit Judge:

Petro-Hunt, L.L.C., Hunt Petroleum Corporation, and Kingfisher Resources, Inc., (collectively "Plaintiffs") filed a declaratory judgment action seeking to quiet title to mineral rights in approximately 180,000 acres of federally owned land within the Kisatchie National Forest. Plaintiffs claim those rights as successors in interest to 96 mineral servitudes that were created before the United States purchased the land in the 1930s. The district court granted summary judgment in favor of Plaintiffs on the grounds of *res judicata* and denied Plaintiff's request for attorneys' fees. The United States timely appeals the district court's grant of summary judgment and Plaintiffs cross-appeal on the issue of attorneys' fees. Because we reverse district court's summary judgment ruling and remand for further proceedings not inconsistent with this opinion, we need not reach the merits of Plaintiffs' cross appeal regarding attorneys' fees since plaintiffs are no longer prevailing parties.[1]

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* District Judge of the Eastern District of Louisiana, sitting by designation.

1. Prevailing party status is a prerequisite to recovering attorneys' fees under 28 U.S.C. § 2412(b).

Appendix B

I. BACKGROUND

In order to give the proper context to our discussion of the merits of this factually dense case, we begin with a brief discussion on Louisiana mineral law, the servitudes in question, and the applicability of certain Louisiana laws to property owned by the United States.

A. *Mineral Servitudes Under Louisiana Law*

Louisiana law governing mineral servitudes does not recognize a separate mineral estate in oil and gas.[2] Mineral rights can be owned separate from the surface land only in the form of a mineral servitude.[3] Hence, any attempt to sell or reserve the ownership of oil and gas results in the creation of a mineral servitude, and the holder of that servitude has the right to enter the property and extract the minerals.[4] Louisiana law has long provided that a mineral servitude is extinguished by prescription resulting from ten years'

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2. *Frost-Johnson Lumber Co. v. Salling's Heirs*, 91 So. 207, 243-245 (La. 1920).

3. *Central Pines Land Co. v. United States*, 274 F.3d 881, 884 (5th Cir. 2001).

4. *Central Pines*, 274 F.3d at 884. *See* La. R.S. § 31:21 ("A mineral servitude is the right of enjoyment of land belonging to another for the purpose of exploring for and producing minerals and reducing them to possession and ownership."); *see also* Luther L. McDougal, III, *Louisiana Mineral Servitudes*, 61 TUL. L. REV. 1097, 1098-99 (1987).

nonuse.[5] The period of prescription on mineral servitudes begins to run on the date a servitude is created,[6] and is interrupted only by "good faith operations for the discovery and production of minerals."[7]

Because the rule of prescription reflects a public policy favoring "the timely return of outstanding minerals to the owner of the land,"[8] the rule may not be abrogated by contract.[9] The Louisiana Supreme Court has declared that "it is against the public policy of this state to allow ... servitudes to remain alive for a longer period than 10 years without use," and that any contracts to the contrary are void as against public policy.[10]

B. ***Creation of Mineral Servitudes***

In 1932, five Louisiana lumber companies—Good Pine Lumber, Trout Creek Lumber, Tall Timber Lumber, Bodcaw

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5. *Central Pines*, 274 F.3d at 884. *See* La. R.S. § 31:27.

6. *See* La. R.S. § 31:28; *see also Ober v. Williams*, 35 So.2d 219, 224 (1948).

7. La. R.S. § 31:29.

8. *See Mire v. Hawkins*, 186 So.2d 591, 597 (1966).

9. *See Leiter Minerals, Inc. v. California Co.*, 132 So.2d 845, 853 (1961). On the other hand, agreements to shorten the period of prescription do not conflict with public policy and are valid. *Id.*

10. *Id.*

Lumber, and Grant Timber—entered an agreement to pool the mineral rights on their respective land holdings in central Louisiana.[11] As part of the pooling agreement, the companies created a joint venture called the "Good Pine Oil Company" and separately conveyed to that company the rights to explore and develop their property for the production of oil, gas, and sulphur.[12] Of these conveyances, six that Bodcaw Lumber and Grant Timber made to Good Pine Oil between November 12, 1932, and May 3, 1934, are relevant to this case. All of these six conveyances involved multiple parcels of land, many of which were non-contiguous, and thus resulted in multiple mineral servitudes.[13]

Each of the six deeds conveying mineral rights to Good Pine Oil contained a clause providing that the ten year period of liberative prescription applied. Five of the deeds expressly stipulated that "none of said [mineral] rights in any of said lands shall be prescribed *unless there shall elapse a full period of ten (10) years in which there shall be no exercise of any of the foregoing rights or user of any of the lands* aforesaid under and by virtue hereof." The sixth contained

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11. *United States v. Nebo Oil*, 190 F.2d 1003, 1005 (5th Cir.1951).

12. *Id.*

13. *See Cox v. Sanders*, 421 So.2d 869, 873 (La. 1982) (stating that "a landowner cannot create a single servitude or mineral royalty right on two or more non-contiguous tracts; and if this is attempted by a single instrument, there are nevertheless as many servitudes or royalty interests as there are non-contiguous tracts of land" and quoting *Whitehall Oil Co. v. Heard*, 197 So.2d 672, 675 (La.Ct.App.1967)).

strikingly similar language. Because the prescriptive period described in these instruments is equivalent to the liberative prescription period of ten years, the contract provision applying a prescriptive period of ten years is enforceable.

C. *Acquisition by the United States*

In the late 1930s, the United States acquired approximately 180,000 acres of land in three Louisiana parishes (Grant Parish, Natchitoches Parish, and Winn Parish) from Bodcaw Lumber and Grant Timber for inclusion in the Kisatchie National Forest. The United States acquired the lands under the Weeks Forestry Act[14] through nine acts of sale and two judgments in condemnation.[15] Each of these eleven conveyances came after the six transactions in which Bodcaw Lumber and Grant Timber conveyed mineral rights on the lands to Good Pine Oil. Consequently, at the time of acquisition, the approximately 180,000 acres of land that the United States acquired was burdened by 96 separate mineral servitudes in favor of Good Pine Oil.

The eleven instruments of transfer (nine deeds and two judgments) conveying the lands to the United States addressed the pre-existing mineral servitudes in different ways. All but one of the instruments contained language stating that the conveyances were "subject to" one or more of the mineral deeds granting rights to Good Pine Oil. Most

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14. 16 U.S.C. § 515.

15. The record shows that the United States acquired the lands between November 28, 1934, and January 28, 1937.

of these transfer instruments contained an additional clause stating that the "mention" of the earlier mineral reservation was "made solely for the purpose of limiting vendor's warranty to the United States in present sale, and *the recital of the said Mineral Sale shall in nowise extend or enlarge the same in point of time.*"

Five of the instruments (four deeds and one judgment) also contained additional mineral reservations in the name of Bodcaw Lumber or Grant Timber, which were to become effective upon the prescription of the relevant servitudes held by Good Pine Oil. For example, the February 11, 1936 deed conveying 24,943.93 acres owned by Bodcaw Lumber "specially reserved" unto Bodcaw Lumber "all of the oil, gas and other minerals . . . subject to the sales to Good Pine Oil Company, Incorporated, for a period of ten years after the expiration of the rights of the said Good Pine Oil Company, Incorporated, under the laws of the State of Louisiana." This deed further provided that this "specially reserved" right would be extended beyond ten years if the right were exercised in a particular fashion, and that if the original ten year period or any extended period terminated for nonuse, "a complete fee in the land [would] become vested in the United States." The other four instruments also contained clauses granting reversionary mineral interests to Bodcaw Lumber or Grant Timber upon the prescription of the Good Pine servitudes.[16] Each of the instruments stated

16. Because the Good Pine servitudes were still in effect, the "reversionary" clauses were invalid. *See Liberty Farms v. Miller,* 45 So.2d 610, 614 (La.1950) ("One may not reserve reversionary rights to minerals when he is not the owner of the minerals at the

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that at the termination of the reservations, the United States would hold the land in "complete fee."

D. ***Act 315***

In 1940, well after the mineral and land transactions described above were complete, the Louisiana Legislature passed Act 315 to eliminate the rule of prescription for mineral rights on lands held by the United States:

> [W]hen land is acquired by conventional deed or contract, condemnation or expropriation proceedings by the United States of America . . . , and by the act of acquisition, verdict or judgment, oil, gas, and/or other minerals or royalties are reserved, or the land so acquired is by the act of acquisition conveyed subject to a prior sale or reservation of oil, gas and/or other minerals or royalties, still in force and effect, said rights so reserved or previously sold shall be imprescriptible.[17]

The purpose of the Act was to facilitate the federal government's purchase of large tracts of land for National Forests, National Parks, military installations, and like

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time the reservation is made. It is settled that, in such instances, the reservation is ineffective and the outstanding mineral interests revert to the person owning the land at the time prescription accrues.").

17. *See* 1940 La. Acts 315; *see also* La. R.S. § 31:149.

purposes.[18] The United States was having difficulty acquiring such tracts in Louisiana because landowners who wished to retain mineral rights were reluctant to sell their land for fear of losing mineral reservations through prescription.[19] By making mineral servitudes on federal land "imprescriptible"—and thus "prevent[ing] the federal government from acquiring mineral rights by prescription"—Act 315 also served Louisiana's interest in taxing and regulating minerals on federal land, powers that would be in doubt should ownership of the minerals be vested in the United States.[20]

E. *Nebo Oil*

In 1948, the United States filed a declaratory judgment action against the Nebo Oil Company to quiet title to the minerals on a particular servitude claimed by Nebo Oil as successor in interest to Good Pine Oil.[21] The complaint referred to a specific parcel, approximately 800 acres in size, lying in portions of section 19 (Township 13 North, Range 6 West) and section 24 (Township 13, Range 7 West) in

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18. *See United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 599 & n. 16 (1973) (citing *Leiter Minerals*, 132 So.2d at 851).

19. *Leiter Minerals*, 132 So.2d at 851.

20. *Id.* at 851-52, 854; *see also Little Lake Misere*, 412 U.S. at 599-600 (citing *Leiter Minerals*).

21. Sometime after December 1941, Nebo Oil Company acquired all of the mineral rights formerly held by Good Pine Oil. *See Nebo Oil*, 190 F.2d at 1006.

Natchitoches Parish. This parcel was one of several parcels acquired by the United States through a February 11, 1936 deed from Bodcaw Lumber, which totaled 24,943.93 acres. Nebo Oil claimed a mineral servitude on the 800-acre parcel as a result of a November 12, 1932 conveyance of mineral rights from Bodcaw to Good Pine Oil.

In its complaint, the United States averred: (1) that no drilling operations had been conducted on the 800-acre parcel during the ten year period beginning on November 12, 1932; (2) that the mineral servitude on the parcel had therefore prescribed for nonuse; and (3) that Nebo Oil intended to drill a well on the land and had advised the government that the company would resist interference. To prevent injury to its property, the United States sought declaratory relief and an order permanently enjoining Nebo Oil from entering the 800-acre parcel for mineral production.

In denying the United States relief, the District Court for the Western District of Louisiana held that the 800-acre servitude had been rendered "imprescriptible" by Act 315.[22] This court affirmed that judgment.[23] First, this court found

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22. *See United States v. Nebo Oil,* 90 F.Supp. 73 (W.D.La.1950).

23. *See Nebo Oil,* 190 F.2d at 1003. The district court's final decree in *Nebo Oil* included a broad finding that the prescriptive periods of the Louisiana Civil Code "do not apply to lands purchased by the United States under the Weeks Act, as amended, for national forest purposes. . . ." The court further found that "under the terms of the deed from Bodcaw Lumber . . . to Good Pine Oil . . . dated November 12, 1932, and the deed from Bodcaw Lumber . . . to the

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that it was bound by Louisiana precedent holding that rules of prescription, including Act 315, "are retrospective in their operation."[24] Second, we held that Act 315's elimination of the rule of prescription as to servitudes on federal land did not dispose of federal property in violation of Article IV, Section 3, clause 2 of the United States Constitution or violate the Contract Clause of the Constitution or the Due Process Clause of the Fourteenth Amendment. The apparent reasoning was that the United States's interest in reclaiming the mineral rights through prescription was not a vested right at the time Act 315 was passed because the Good Pine servitudes had been created less than ten years earlier.[25]

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United States of America dated February 11, 1936, the oil, gas and sulphur in, on and under the lands conveyed to the United States under such deed . . . , which deed covered the lands herein involved, were vested in perpetuity in Good Pine Oil . . . , its successors and assigns, and, through it, in the defendant herein, as its successor in interest." Despite the breadth of these findings, the district court returned to the property that was actually before it when it concluded its decree: "IT IS NOW ORDERED, ADJUDGED AND DECREED that the oil, gas, and sulphur in, on and under the lands described in the complaint are vested in perpetuity in Nebo Oil Company, Inc., its successors and assigns."

24. *See Nebo Oil,* 190 F.2d at 1008 (citing *Whitney Nat'l Bank of New Orleans v. Little Creek Oil Co.,* 33 So.2d 693 (1947)).

25. *See id.* at 1008-10; *see also id.* at 1008 ("It cannot be considered a vested right if it is nothing more than a mere expectation, or hope, based upon an anticipated continuance of the applicable general laws.").

Appendix B

F. *After Nebo Oil*

Subsequent to our decision in *Nebo Oil,* there were two decisions concerning the retroactive applicability of Act 315 to mineral servitudes located on property owned by the United States. First, in *United States v. Little Lake Misere Land Company,* the government sued to quiet title in two adjacent parcels of land in Cameron Parish, Louisiana, which it had acquired under the Migratory Bird Conservation Act.[26] The instruments of acquisition—a 1937 deed and a 1939 judgment in condemnation—reserved to Little Lake Misere oil, gas, sulphur, and other minerals for a period of ten years from the date of vesting of title in the United States.[27] But those instruments further provided that if the initial ten year period ended and no production was occurring, or if operations subsequently ceased for more than sixty days, "the right to mine, produce and market said oil, gas, sulphur or other mineral shall terminate . . . and the complete fee title to said lands shall thereby become vested in the United States."[28] Nevertheless, following the enactment of Act 315, the servitude holder, Little Lake Misere, asserted that the reservations had become "imprescriptible."

In a brief per curiam opinion, this court held in favor of the servitude holder, finding that the contractual terms of prescription did not apply to the servitudes in question in

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26. 412 U.S. at 582.

27. *Id.*

28. *Id.* at 583.

the light of Act 315.[29] This holding was based on our prior decision in *Nebo Oil* regarding the constitutionality of the retroactive application of Act 315.[30]

But the United States Supreme Court granted certiorari and reversed.[31] In so doing, the Court did not expressly reject our interpretation of Louisiana law or the analysis of Act 315's constitutionality in *Nebo Oil.* Instead, invoking the choice-of-law doctrine of *Clearfield Trust Co. v. United States,*[32] the Supreme Court held that this court erred in presuming, as a threshold matter, that Louisiana state law applied.[33] Furthermore, because *Little Lake Misere* involved a determination of rights under a land acquisition agreement that was "explicitly authorized, though not precisely governed, by the Migratory Bird Conservation Act" and "to which the United States itself is a party," the Supreme Court held that it was for the federal courts to "fashion" the governing rule of law in that case.[34] Determining that Act 315 would deprive the United States of "bargained-for-

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29. *See United States v. Little Lake Misere Land Co.*, 453 F.2d 360 (5th Cir.1971).

30. *Id.* at 362.

31. *See United States v. Little Lake Misere Land Co.*, 318 U.S. 363 (1943).

32. 318 U.S. 580 (1943).

33. *See Little Lake Misere,* 412 U.S. at 591.

34. *See id.* at 594.

contractual interests" by abrogating the terms of the acquisition instruments relating to prescription, the Supreme Court held that the Act was "plainly hostile to the interests of the United States" and could not be "borrowed" as the rule of decision.[35] Finally, the Supreme Court held that the appropriate rule of decision was to be supplied by either federal common law or "residual" state law (*i.e.*, state law without Act 315), both of which would give effect to the contract terms.[36]

The second decision pertinent here was *Central Pines Land Company v. United States.*[37] In that case, we were called upon to revisit our *Nebo Oil* ruling in the light of the Supreme Court's opinion in *Little Lake Misere.*[38] The facts of *Central Pines* were quite similar to those of *Nebo Oil.* First, like *Nebo Oil, Central Pines* involved the acquisition of land by the United States in the 1930s for the Kisatchie National Forest.[39] Second, also like *Nebo Oil,* the lands so acquired were subject to a preexisting mineral servitude.[40] Finally, the successor in interest to the servitude owner also argued that Act 315 had rendered the servitude in *Central Pines* "imprescriptible."[41]

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35. *Id.* at 596.

36. *Id.* at 604.

37. 274 F.3d 881.

38. 274 F.3d at 881.

39. *See id.* at 885.

40. *Id.*

41. *Id.* at 886.

Appendix B

Despite the factual similarities between *Central Pines* and *Nebo Oil,* and perhaps taking a cue from the Supreme Court's *Little Lake Misere* decision, this court ruled that Act 315 did not apply to *Central Pines.*[42] While we declined to expressly overrule *Nebo Oil*'s constitutional analysis, we also rejected the presumption in *Nebo Oil* that Louisiana law governed the terms of the transactions at issue.[43] In particular, following the analysis of *Little Lake Misere,* this court held that the right asserted by the United States—*i.e.*, the right to reclaim mineral interests through prescription—was a right acquired through a duly authorized federal land acquisition agreement and, therefore, that federal choice-of-law principles applied.[44]

Applying these principles, the *Central Pines* court determined that Act 315 could not be borrowed as the rule of decision because, as in *Little Lake Misere,* it was hostile to the government's contractual interests in reclaiming minerals through the "legal rules in place at the time of contract."[45] While acknowledging that this interest was "arguably not as powerful as the federal right to enforce explicit contractual terms" (the right at stake in *Little Lake Misere*), we determined that this interest outweighed any state interest in applying Act 315.[46] Noting that the "main

42. 274 F.3d at 886.

43. *Id.* at 889-90.

44. *Id.* at 888-90.

45. *Id.* at 891.

46. *Id.* at 891-92.

justification" for Act 315 was to facilitate federal land acquisitions, this court observed that "[such] justification has no bearing on retroactive application of Act 315, because an acquisition cannot be facilitated by a law not yet in existence."[47] Finally, in recognition of the federal interest in the general rule of prescription, we also determined that the proper rule of decision was "residual" state law, *i.e.*, Louisiana law without Act 315.[48]

G. *The Present Dispute*

In the 1990s, the United States began granting mineral leases on certain Forest Service lands that had been burdened by Good Pine servitudes but were not involved in *Nebo Oil*. The government regarded these servitudes as prescribed for ten years' nonuse. In determining that the servitudes were subject to the rule of prescription, rather than Act 315, the United States relied on the Supreme Court's ruling in *Little Lake Misere*.

In response to this leasing activity, the Plaintiffs, who are successors in interest to Nebo Oil Company, initiated this declaratory judgment action on February 18, 2000. Their complaint named the United States and various parties to whom the United States granted mineral leases or offers to lease on lands that are or were burdened by Good Pine servitudes as defendants. Plaintiffs sought a ruling declaring that they are the owners, in perpetuity, of those servitudes

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47. *Id.* at 892 (citing *Little Lake Misere*, 412 U.S. at 599).

48. *Id.*

and that the mineral leases and offers to lease issued by the United States were therefore null and void. The United States argued in response to the Plaintiffs' complaint that the 95 separate mineral servitudes through which the Plaintiffs claim mineral rights are subject to prescription for nonuse and that the relevant leases and offers to lease relate to lands on which the servitudes claimed by Plaintiffs have already prescribed.

Plaintiffs filed a motion for summary judgment[49] in the district court. In their motion, Plaintiffs argued that they were entitled to judgment as a matter of law because *Nebo Oil* and the doctrine of *res judicata* or collateral estoppel[50] would

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49. Plaintiffs actually filed two motions for summary judgment. In their second summary judgment motion, Plaintiffs argued that even if the rule of prescription applied, five servitudes burdening nearly seventy percent of the 180,000 acres in dispute had not prescribed because they had exercised their rights through continuous drilling operations. The United States conceded that sufficient drilling operations had interrupted the running of prescription on some of the servitudes and introduced evidence regarding the particular histories of each of the 96 Good Pine servitudes. But the district court dismissed this second motion as moot due to its *res judicata* determination and expressly declined to consider the issue of whether sufficient drilling operations interrupted the prescriptive period as to any particular servitude. Because we reverse the district court's grant of summary judgment and because the district court has not had an opportunity to pass on the question of what servitudes may have prescribed, we will not reach the merits of Plaintiffs' second motion and remand this issue to the district court.

50. Although Plaintiffs did not specifically use the term "collateral estoppel" in their motion for summary judgment, Plaintiffs' argument in favor on the motion was based on *res judicata*. "The rules of *res judicata* encompass two separate but linked

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bar any defense raised by the United States as to the prescriptibility of the servitudes. The United States opposed the Plaintiffs' motion for summary judgment.

H. *The District Court's Ruling*

On December 18, 2001, the district court issued a memorandum ruling granting the Plaintiffs' motion for summary judgment. Holding that *res judicata* barred the United States's asserted defenses to Plaintiffs' claim of ownership due to this court's decision in *Nebo Oil,* the district court declared that Plaintiffs were "the exclusive owners in perpetuity of the approximately 180,000 acres of mineral servitudes at issue in this case." The district court based its ruling on this court's decision in *Nebo Oil.* The court noted that the 800-acre servitude addressed in *Nebo Oil* burdened a parcel of land that the United States acquired in 1936 as part of a larger purchase of 24,943.93 acres and that all 24,943.93 acres were burdened by mineral servitudes that were owned in common with the 800-acre servitude. Because the *Nebo Oil* decision referred to the 24,943.93-acre transaction, the district court found that *Nebo Oil* "applied Act 315 of 1940 to the mineral reservation and sale of the 24,943.93 acre tract" and that "*res judicata* clearly applies" to disputes over the minerals on this tract.

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preclusive doctrines: (1) true *res judicata* or claim preclusion and (2) collateral estoppel or issue preclusion." *See St. Paul Mercury Ins. Co. v. Williamson,* 224 F.3d 425, 436 (5th Cir.2002) (internal citation omitted). Because these two doctrines are separate, collateral estoppel will be analyzed separately in this opinion.

As for the remainder of the approximately 180,000 acres of land—acquired by the United States in ten additional transactions that were not specifically addressed in *Nebo Oil*—the district court found that *res judicata* was also applicable due to the factual similarity in the transactions. Specifically, because of the similarities in the transactions through which the United States acquired the lands and in the earlier transactions creating mineral servitudes on the land, the district court stated: (1) that "the entire 180,000 acres was similarly situated to the 800 acres at issue in *Nebo Oil*"; (2) that the United States had a "full and fair opportunity" (in *Nebo Oil*) to "litigate the application and constitutionality of Louisiana Act 315 to this mineral property"; and (3) that "[t]he government should not be allowed to litigate now that which it could have litigated 50 years ago."

Accordingly, the district court entered a final judgment on May 29, 2002. The United States timely appealed.

II. Analysis

The critical issue before this court focuses on whether the United States is precluded from challenging Plaintiffs' assertion of ownership over all 96 of the mineral servitudes arising from their status as successors in interest to Good Pine Oil. Because the district court granted summary judgment, we review that decision *de novo*.[51]

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51. *Central Pines*, 274 F.3d at 886.

Appendix B

A. *Res Judicata-A Claim Precluded by Sameness?*

"Claim preclusion, or *res judicata*, bars the litigation of claims that either have been litigated or should have been raised in an earlier suit."[52] The test for *res judicata* has four elements: (1) the parties are identical or in privity; (2) the judgment in the prior action was rendered by a court of competent jurisdiction; (3) the prior action was concluded by a final judgment on the merits; and (4) the same claim or cause of action was involved in both actions.[53] In this case, there is no dispute over the competency of the *Nebo Oil* court, the finality of its judgment in that case, or the sameness of the parties. The only dispute is whether this case involves the same claim or cause of action as *Nebo Oil*.

To determine whether two suits involve the same claim or cause of action, this court has adopted the transactional test of the Restatement (Second) of Judgments, § 24.[54] Under that test, the preclusive effect of a prior judgment extends to all rights the original plaintiff had "with respect to all or any

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52. *In re Southmark Corp.*, 163 F.3d 925, 934 (5th Cir.1999). *See Brown v. Felsen*, 442 U.S. 127, 131 (1979) ("*Res judicata* prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding.").

53. *Southmark*, 163 F.3d at 934.

54. *Id.* (citing *Southmark Properties v. Charles House Corp.*, 742 F.2d 862, 870-71 (5th Cir.1984)).

part of the transaction, or series of connected transactions, out of which the [original] action arose."[55]

> What factual grouping constitutes a "transaction", and what groupings constitute a "series", are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.[56]

"[T]he critical issue is whether the two actions under consideration are based on the *same nucleus of operative facts.*"[57]

Contending that this action is not based on the same nucleus of operative facts as the action in *Nebo Oil,* the United States points out that it initiated the *Nebo Oil* litigation in response to learning that Nebo Oil intended to conduct drilling operations on a particular 800-acre parcel of federal land under a mineral servitude that, in the view of the United States, had prescribed.[58] The operative facts of that

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55. Restatement (Second) of Judgments § 24(1) (1982).

56. *Id.* § 24(2).

57. *Southmark,* 163 F.3d at 934 (internal quotation and citation omitted).

58. The United States acknowledges that it is precluded, as a matter of *res judicata,* from re-litigating title to the 800-acre mineral servitude at issue in *Nebo Oil.*

action included: (1) the United States's purchase of the 800-acre parcel from Bodcaw Lumber on February 11, 1936; (2) the creation of the mineral servitude burdening that parcel in a November 11, 1932 conveyance from Bodcaw Lumber to Good Pine Oil; and, most importantly, (3) the history of use or nonuse of that servitude. In contrast, the United States argues that the rights asserted by the parties in this case depend on ten additional federal land acquisitions, five additional mineral conveyances to Good Pine Oil, and the drilling histories on 95 additional servitudes.

The district court found that it did not "need to delve into such matters as what constitutes contiguous tracts, the number of servitudes, and whether prescription of nonuse was interrupted by good faith operations for the discovery and production of minerals." The district court reasoned that it was "faced with what may be viewed as a primarily legal question." Because all of the Good Pine servitudes were similarly situated with respect to application of Act 315, the court did not expressly identify the operative facts of this case and *Nebo Oil* and determine that they were the same. Instead, the district court relied on the fact that *Nebo Oil* addressed a federal land acquisition and the similarity among that acquisition and the other ten acquisitions at issue here.

But the district court's reliance on the factual similarities among the various servitudes and land acquisitions was misplaced. As the United States correctly points out, these observations of factual similarity, although potentially relevant for purposes of collateral estoppel, are not relevant to *res judicata*. Collateral estoppel prevents parties from re-litigating the same issues conclusively determined between them in a previous action. Although similar in principle, true

res judicata is concerned with a sameness of operative facts. Neither the Plaintiffs nor the district court have identified a principle of *res judicata* that requires an owner of separate properties to litigate title to all of those properties in response to a threat to his right of full use and enjoyment of only one of them.[59] While an action to quiet title in one property may raise the same legal issues that would also be in question in an similar type of action involving a similarly situated property, the operative facts of the two actions would be distinct.

In this case, each of the Good Pine servitudes was a distinct real right under Louisiana law.[60] The *Nebo Oil* action involved one servitude burdening an 800-acre parcel of land and was filed in response to a threat to the United States's asserted right of full use and enjoyment of that land. The United States took the position that the servitude was subject to prescription and had prescribed, and therefore it had to show ten years' nonuse *of that particular servitude* to succeed on its claim. The existence and use histories of the

59. Like the district court, the Plaintiffs seize on the Supreme Court's statement in *Nevada v. United States*, 463 U.S. 110, 129 n. 10 (1983), that "[t]he policies advanced by the doctrine of *res judicata* perhaps are at their zenith in cases concerning real property, land and water." While this is certainly true, nothing in the *Nevada* opinion undermines the principle that the doctrine of res judicata does not bar a second action unless it is the "same cause of action" as the first one. *See id.* at 130 ("To determine the applicability of *res judicata* to the facts before us, we must decide first if the 'cause of action' which the Government now seeks to assert is the 'same cause of action' that was asserted [previously].").

60. *See* McDougal, *supra* note 4, at 1099.

other Good Pine servitudes were not operative facts of either the government's claim or Nebo Oil's defense to that claim. Although the reasoning of *Nebo Oil*—that the Good Pine servitudes were imprescriptible due to Act 315-made the use histories irrelevant as a matter of law, each servitude remained a distinct real right. If *Nebo Oil* remains good law, this court's holding that Act 315 rendered the Good Pine servitudes imprescriptible is final and conclusive between the United States and the Plaintiffs as a matter of collateral estoppel. But *res judicata* is no bar to the United States's defense in this action because its claim with respect to each servitude depends on a unique set of operative facts. Thus, if the United States's defense of this action is limited, it would be limited only under collateral estoppel.

B. *Collateral Estoppel-An Issue Precluded by Prior Litigation?*

Collateral estoppel precludes a party from litigating an issue already raised in an earlier action between the same parties[61] only if: (1) the issue at stake is identical to the one involved in the earlier action; (2) the issue was actually litigated in the prior action; and (3) the determination of the issue in the prior action was a necessary part of the judgment in that action.[62] In this circuit, collateral estoppel applies to

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61. "Mutuality" is a prerequisite only when the party to be estopped is the United States. *See United States v. Mendoza,* 464 U.S. 154 (1984).

62. *Stripling v. Jordan Prod. Co.,* LLC, 234 F.3d 863, 868 (5th Cir. 2000).

"pure questions of law" only when there has been no "change in controlling legal principles."[63] The United States contends that collateral estoppel does not apply in the present case because it seeks to raise issues that are not identical to the issues litigated in *Nebo Oil* and, in any event, there has been a change in controlling legal principles. We agree.

In ruling that the United States is precluded from re-litigating the applicability of Act 315 to the Good Pine servitudes, the district court did not specify what particular issues were actually litigated in *Nebo Oil*. But, as the United States discusses in its brief, the question of Act 315's applicability to this case can be divided into three distinct sets of legal issues. First, there are threshold choice-of-law issues, including whether the rights arising out of the federal land acquisitions are governed by state law (including Act 315) or by federal law, and, if federal law governs, whether and what provisions of state law should be "borrowed" to provide the rules of decision.[64] Second, there are issues regarding the interpretation of Act 315 under state law, including the question whether Act 315 is to be applied retroactively. Finally, there are issues concerning whether applying Act 315 retroactively is constitutional. That these issues are distinct legal issues cannot be doubted after this court's ruling in *Central Pines*.[65]

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63. *Society of Separationists, Inc. v. Herman*, 939 F.2d 1207, 1214 (5th Cir. 1991).

64. *See Little Lake Misere*, 412 U.S. at 590-604; *Central Pines*, 274 F.3d at 887-92.

65. *See* 274 F.3d at 889-90.

Nebo Oil only addressed the latter two sets of issues.[66] That is, in *Nebo Oil,* this court assumed the applicability of Act 315, confined its analysis to an interpretation of the Act under state law, and determined that the Act did not violate the federal constitution.[67] In the present case, the United States does not seek to revisit the issues actually addressed in *Nebo Oil.* Instead, it seeks to raise the threshold choice-of-law issue that *Nebo Oil* did not address because it was presumed. In particular, the United States contends that: (1) federal law governs the rights arising out of its acquisition of the lands at issue in this case;[68] (2) Act 315 may not be borrowed as the rule of decision because it is hostile to the United States's contractual interests;[69] and (3) the rule at the time of the contract (*i.e.,* the Louisiana rule of prescription) should govern.[70]

Because these questions of law are not "identical" to the issues raised in *Nebo Oil* and were not "actually litigated" in *Nebo Oil,* we find that the United States is not precluded, under collateral estoppel, from raising them in this case.[71]

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66. *See id.* (describing the scope of *Nebo Oil*).

67. *See id.*

68. *See Little Lake Misere,* 412 U.S. at 594; *Central Pines,* 274 F.3d at 887-90.

69. *See Central Pines,* 274 F.3d at 890-92.

70. *See id.* at 892.

71. *RecoverEdge L.P. v. Pentecost,* 44 F.3d 1284, 1290 (5th Cir. 1995).

Although the Plaintiffs cite scattered portions of both the district court's opinion and the United States's brief in *Nebo Oil* in an effort to show that the choice-of-law issue was determined in that action, we stand by our prior finding in *Central Pines* that it was not.[72]

Nevertheless, even if the choice-of-law issue had been raised in *Nebo Oil,* changes in the controlling legal principles prevent the United States from being precluded from litigating the issue in this case.[73] After the decisions in *Little Lake Misere* and *Central Pines,* it is clear that federal law governs the choice-of-law decision presented by the facts of this case. Hence, we are prohibited from borrowing Act 315 as the federal rule of decision because it is hostile to the federal interests at stake.[74]

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72. *See* 274 F.3d at 889-90.

73. The Plaintiffs' argument that the Supreme Court's decision in *United States v. Stauffer Chem. Co.,* 464 U.S. 165 (1984), compels a contrary conclusion is mistaken. In that case, there had been no change in controlling legal principles between the first and the second action. *See id.* at 170. The Court was concerned, instead, with the exception to the otherwise applicable rules of preclusion for "unmixed questions of law" arising in "successive actions involving unrelated subject matter." *See id.* The United States does not rely on this exception in this case.

74. *See Central Pines,* 274 F.3d at 888-90.

III. Conclusion

Because neither *res judicata* nor collateral estoppel preclude the United States from challenging Plaintiffs' assertion of ownership over the mineral servitudes in question, we reverse the district court's grant of summary judgment. In addition, we find that the 95 servitudes that were not at issue in *Nebo Oil* are subject to the contractual provisions permitting prescription after ten years' nonuse. Accordingly, we remand this case so that the district court can determine which servitudes have in fact prescribed.

REVERSED AND REMANDED.

APPENDIX C — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA, SHREVEPORT DIVISION FILED MAY 29, 2002

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

CIVIL ACTION NO. 00-0303

JUDGE DONALD E. WALTER

MAGISTRATE JUDGE PAYNE

PETRO-HUNT L.L.C., ET AL.

VERSUS

UNITED STATES OF AMERICA, ET AL.

JUDGMENT

This cause came on to be heard by the Court by way of summary judgment pursuant to Rule 56 filed by plaintiffs, Petro-Hunt, L.L.C., Hunt Petroleum Corporation and Kingfisher Resources, Inc., which motion was opposed by defendant, United States of America. The court will assume all other defendants, who were alleged lessees of the United States and whose title was dependent upon whatever title the United States had, also opposed the motion; including those defendants who have been defaulted for not responding. The following defendants did appear and file responsive pleadings; Aspect Resources, L.L.C.; Justiss Oil Company;

MB Exploration, L.L.C.; Palmer Petroleum, Inc.; Snyder Oil Corporation, a/k/a Santa Fe Snyder a/k/a Devon SFS; John P. Strang; UMC Petroleum Corp. and its successor Ocean Energy Resources; and Wheless TDL Exploration Co., Ltd. The following defendants have been placed in default by the clerk: Bayou Petroleum Company; First Texas Hydrocarbons, Inc.; Oscar C. Forland; Northstar Energy, L.L.C.; Howell R. Spear; Gulf Coast Oil & Gas Co.; J. Bradley Jeffreys and Energy Arrow Exploration, L.L.C.

The Court having examined the memoranda in support of plaintiffs' Motion for Summary Judgment as well as all affidavits and attachments thereto and the reply memoranda of defendants, and after having considered the law and for the reasons set forth in the Memorandum Ruling of this court in this matter dated December 18, 2001, the court is of the opinion that the Motion for Summary Judgment filed by plaintiffs based on the doctrine of *res judicata* is meritorious and should be granted;

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the judgment be and is hereby entered in favor of plaintiffs, Petro-Hunt, L.L.C., Hunt Petroleum Corporation and Kingfisher Resources, Inc., and against defendants, United States of America; Aspect Resources, L.L.C.; Justiss Oil Company; MB Exploration, L.L.C.; Palmer Petroleum, Inc.; Snyder Oil Corporation, a/k/a Santa Fe Snyder a/k/a Devon SFS; John P. Strang; UMC Petroleum Corp. and its successor Ocean Energy Resources; Wheless TDL Exploration Co., Ltd.; Bayou Petroleum Company; First Texas Hydrocarbons, Inc.; Oscar C. Forland; Northstar Energy, L.L.C.; Howell R. Spear; Gulf Coast Oil & Gas Co.; Bradley Jeffreys and Energy Arrow Exploration, L.L.C.

Appendix C

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiffs, as named hereinabove, are hereby declared to be the owners, in indivision, in perpetuity, of all of the mineral servitudes which are the subject of this suit being 180,117 mineral acres, more or less, which is described with particularity in the attached Exhibit "A" [intentionally omitted] hereto, which is incorporated herein by reference the same as if copied *in extenso*. Plaintiff, Petro-Hunt, L.L.C. is the owner in perpetuity of an undivided 64.28572 percent interest in the mineral servitudes described in Exhibit "A" [intentionally omitted] hereto; plaintiff Hunt Petroleum Corporation is the owner in perpetuity of an undivided 16.80672 percent interest in the mineral servitudes described in Exhibit "A" [intentionally omitted] hereto; and plaintiff Kingfisher Resources, Inc. is the owner in perpetuity of an undivided 18.90756 percent interest in the mineral servitudes described in Exhibit "A" [intentionally omitted] hereto.

IT IS ALSO ORDERED, ADJUDGED AND DECREED that as to the aforementioned ±180,117 acres described hereinabove, that the Louisiana law of prescription of mineral servitudes will not run, and will be tolled, for so long as the United States of America holds title to the surface of this said land per Louisiana Act 315 of 1940, now codified in Article 149 of the Louisiana Mineral Code. Based upon the Court's understanding that some third parties may claim title to various portions of the property described as Exhibit "A" [intentionally omitted], the Court holds that nothing contained in this judgment purports to adjudicate or affect rights ~~of such~~ third parties who are presently not before this Court.

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IT IS ALSO ORDERED, ADJUDGED AND DECREED that all purported mineral leases issued by the United States of America on the ±180,117 acres described herein are hereby declared null and void, *ab initio*, and of no force and effect.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the United States of America is permanently enjoined from attempting to in any manner grant mineral leases in, on, or under the property listed in Exhibit "A" [intentionally omitted].

Plaintiff's Motion for Attorneys Fees was previously denied by the Court. Plaintiffs are awarded all taxable costs of these proceedings against defendant United States of America and judgment is hereby entered accordingly.

THUS DONE AND SIGNED at Shreveport, Louisiana this 29 day of May 2002.

s/ Donald E. Walter
DONALD E. WALTER
UNITED STATES DISTRICT JUDGE

Judgment Entered
May 29, 2002

APPENDIX D — MEMORANDUM RULING OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA, SHREVEPORT DIVISION FILED DECEMBER 18, 2001

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

CIVIL ACTION NO. 00-0303

JUDGE DONALD E. WALTER

MAGISTRATE JUDGE PAYNE

PETRO-HUNT L.L.C., ET AL,

VERSUS

UNITED STATES OF AMERICA, ET AL.

MEMORANDUM RULING

Before this Court is a Motion for Summary Judgment [Doc. 85] and a Reply to Defendant's Opposition to Plaintiff's Motion for Summary Judgment [Doc. 142], filed on behalf of the Plaintiff, Petro-Hunt, L.L.C., Hunt Petroleum Corporation, and Kingfisher Resources, Inc. (Petro-Hunt), pursuant to Federal Rule of Civil Procedure 56. Defendants, United States of America, et al., oppose the Motion [Doc. 133].[1] For the reasons assigned herein, Plaintiff's

1. The number and relationship of the co-defendants with the United States of America requires a comment. Though this Court is (Cont'd)

motion is GRANTED and Plaintiffs, Petro-Hunt, L.L.C., Hunt Petroleum Corporation and Kingfisher Resources, Inc. are hereby declared the exclusive owners in perpetuity of the approximately 180,000 acres of mineral servitudes at issue in this case and being more fully described in Plaintiff's Complaint [Doc. 1].

(Cont'd)
not presented with any contractual disputes (cross-claims) between mesne defendants and the United States, the fate of certain leaseholds obtained by the various defendants hinges upon the ownership of the various mineral servitudes, which is distinctly at issue in this case. Article 114 of the Louisiana Mineral Code (La.R.S. § 31:114) states, "A mineral lease is a contract by which the lessee is granted the right to explore for and produce minerals." Though the mineral lease has been characterized in a seemingly conflicting manner, as being both a real right and giving rise to a contractual relationship (*See* comment to La.Min.Code art. 16), none would dispute that a valid mineral lease must be originally obtained from a lessor having an executive or ownership interest in the underlying mineral rights (*See* La.Min.Code art. 116) or one who thereafter acquires such an interest (*See* La.Min.Code arts. 144 & 145). All named defendants claim to own rights as lessees (and likely also as assignees), which are dependant upon the United States, as lessor, ultimately having an executive or ownership interest in the mineral rights at issue. Such is evidenced by plaintiff's motion to pretermit entry of judgment by default against certain defendants other than the United States, until the Court settles the title dispute between it and the United States [Doc. 58] and by certain defendant's adoption by reference of the briefs of the United States [Docs. 123, 126 & 131]. Simply put, the various defendants interests are, for the moment, aligned with the United States and ultimately dependant upon the United States prevailing. Therefore, for clarity's sake, this Court will not delve into contractual relationships between the various defendants and the United States and, for purposes of this memorandum, will refer to and treat the defendant, as being the United States.

Appendix D

BACKGROUND

The case at bar cannot be properly framed without an examination of the Fifth Circuit's *United States v. Nebo Oil Co.*[2] opinion, as it provides both the historical backdrop and the grounds for Petro-Hunt's pivotal assertion of *res judicata* and/or claim preclusion.[3] This Court includes the following lengthy, but relevant, quotations because it reflects the view of a panel of judges much closer in time and in possession of the full record:

> This suit was brought by the appellant, United States of America, against the appellee, Nebo Oil Company, Inc., for a judgment declaring that appellant is the owner of the minerals . . . underlying approximately eight hundred acres of land located in the Parish of Natchitoches, States of Louisiana. A trial was had by the court without a jury and judgment was entered dismissing the complaint.
>
> The undisputed facts are these: In the year 1932 five lumber companies decided to pool the mineral rights in their lands in order to secure more favorable exploration and development thereof, it being agreed by the parties that each

2. 190 F.2d 1003 (5th Cir.1951).

3. While *res judicata* generally refers to claim preclusion, it is sometimes used when referencing issue preclusion. For purposes of this Memorandum, use of *res judicata* is synonymous with claim preclusion.

would share in any production obtained from the pooled acreage in proportion to the acreage which each lumber company contributed to the pool. For that purpose, the Good Pine Oil Company was organized. . . .

One of these conveyances to Good Pine Oil was by recorded deed from the Bodcaw Lumber Company, dated November 12, 1932, covering all of the oil, gas and sulphur underlying a tract of land containing 37, 532.13 acres of which the 800 acres of land here involved was a part.

Prior to the year 1936 the United States was interested in purchasing lands in Louisiana for national forest purposes and had found that owners of large tracts of land were unwilling to sell their lands because of court decisions holding that the sale or reservation of mineral rights in Louisiana created only a right in the nature of a servitude which was subject to prescription by ten years nonuser [sic]. However, the United States Department of Agriculture, Forest Service, was not in accord with this view and on May 29, 1935, submitted to Bodcaw Lumber Company an opinion of the Assistant Solicitor of the Department of Agriculture to the effect that the prescriptive provisions of the Louisiana Civil Code would not apply to lands sold to the United States for national forest purposes.

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Thereafter, on February 11, 1936, Bodcaw sold to the United States a tract of timber land containing 24,943.93 acres, of which the 800 acre tract whose minerals had previously been conveyed to Good Pine Oil formed a part. . . .

At the time the sale was made, the officers and directors of Bodcaw believed that the mineral rights in the lands sold were valuable and the price of $1.75 per acre paid by appellant for the timber lands acquired under the 1936 deed did not reflect the value of any mineral rights. Moreover, the uncontradicted testimony is that Bodcaw would not have sold the timber lands to the United States had its representatives then taken the position, as they do now, that the prescriptive provisions of the Louisiana Civil Code would be applicable to the lands sold.

In December 1941 the Good Pine Oil Company was dissolved . . . . [and] Nebo Oil Company, was organized and by mesne conveyances acquired all of the mineral rights formerly held by Good Pine Oil.

It was stipulated by and between the parties that no drilling operations have been conducted on the 800 acres of land involved or on lands contiguous thereto. However, it appears that the mineral rights acquired by Good Pine Oil by virtue of the 1932 deed from Bodcaw were exercised by the drilling of five separate wells between October

> 1941 and October 1948, three of which were located on lands conveyed to the United States under the 1936 deed from Bodcaw. . . .
>
> The gravamen of the complaint is that no drilling operations were conducted on the lands in suit during the ten years period beginning November 12, 1932; and that consequently any mineral rights owned by Good Pine Oil or its successor, Nebo Oil, had prescribed by ten years of nonuser [sic] of the servitude. For answer, Nebo Oil denied that the mineral rights had prescribed and set up the defenses, among others, that there had been an interruption of the ten year prescriptive period for the reason that the minerals underlying the 800 acre tract were pooled with other minerals which had been developed, and exercise of the servitude on any part of the pooled acreage interrupted prescription with respect to all of the minerals included in the pool; and that the mineral rights were imprescriptible by virtue of Act 315 of the Louisiana Legislature of 1940.[4]

The Court first rejected Nebo Oil's defense that the pooling of the lands interrupted prescription, finding that the pooling agreement was never recorded and thus could not affect third parties.[5]

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4. *Id.* at 1005-06.

5. *Id.*, at 1007. The Court likely addressed this issue first and directly because of basic abstention doctrine concerns. If the Court

(Cont'd)

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Next, the Court addressed the Constitutionality of Act No. 315 of 1940, which derogated from the default rules applicable to the extinguishment of mineral servitudes and established a rule of imprescriptability for those servitudes burdening lands purchased or expropriated by the United States.[6] The Court found that Act 315 was retroactively applicable, "because of the general rule of law established by the jurisprudence of this State that laws of prescription and those limiting the time within which actions may be

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(Cont'd)
had found interruption of prescription by pooling it could have avoided the constitutional questions presented. Otherwise, one could view the interruption of prescription by pooling as a moot issue in light of the Court's application of Act 315 to the servitude at issue. Approaching this from a *res judicata* perspective, as opposed to a Constitutional mindset, such an issue or other issues relating to prescription need not be addressed first and may be properly viewed as moot in the event *res judicata* is held to bar such a claim. Therefore, this Court need not entertain plaintiff's motion for summary judgment on alternative grounds of interruption of prescription [Doc. 88] nor defendant's contentions in such regards.

6. Act 315 of 1940 reads in pertinent part, to wit: "Section 1. Be it enacted by the Legislature of Louisiana, That when land is acquired by conventional deed or contract, condemnation or expropriation proceedings by the United States of America, or any of its subdivisions or agencies, from any person, firm or corporation, and by the act of acquisition, verdict or judgment, oil, gas, and/or other minerals or royalties are reserved, or the land so acquired is by the act of acquisition conveyed subject to a prior sale or reservation of oil, gas and/or other minerals or royalties, still in force and effect, said rights so reserved or previously sold shall be imprescriptible."

brought are retrospective in their operation."[7] The Court further found that the scheme of acquisitive prescription cannot give rise to a vested right and is "nothing more than a mere expectation, or hope, based upon an anticipated continuance of the applicable general laws."[8] The court concluded "that this so-called 'reversionary interest' is nothing more than a mere expectancy, or hope, based upon an anticipated continuance without change of the applicable laws of prescription and cannot be regarded as a vested right protected by the Constitution."[9]

The *Nebo* Court concluded with the following broad statement:

> Act 315 of 1940 provides that when lands are conveyed to the United States subject to a prior

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7. *Id.* at 1008 (*citations omitted*). Stating that the statute was retroactively applied is a bit of a misnomer. Act 315 of 1940 was merely applied from the moment of its legislative birth, with the result that application in 1940 may have had retroactive effect upon previously contemplated contractual or legislatively authorized expectations. Put squarely, those outstanding mineral servitudes which had not prescribed at the time Act 315 of 1940 was enacted would never prescribe and the hopes of the surface owner would have been defeated. All the outstanding, yet unprescribed, mineral interests were now made imprescriptable. True retroactive application would have meant that prior mineral rights which had prescribed to the governmental landowner would have been undone. This is not what happened, as such rights would have been "vested."

8. *Id.*

9. *Id.* at 1009. The Court also found that Act 315 of 1940 did not run afoul of the Contract Clause of the U.S. Constitution. *Id.*

sale or reservation oil, gas, or other minerals still in force and effect, the rights so reserved or previously sold shall be imprescriptible. It does not state or imply that the reserved rights shall be increased or varied but only that they shall not be lost by prescription. The consideration of $1.75 per acre paid by the United States did not cover the value of any mineral rights. Indeed, since the mineral underlying the lands had previously been sold to Good Pine Oil without limit for time of their enjoyment, Bodcaw did not own any minerals which it could sell to the United States. Neither could it reserve nor sell the expectation of a servitude lapsed for nonuser [sic]. . . . All that Bodcaw had which it could sell to the United States was the timber land itself. That was the obligation of the contract and it remains unimpaired. By virtue of its ownership of the land appellant could merely hope that the outstanding mineral servitude might lapse but this hope or expectancy was born or a statute of prescription based on the then existing public policy of the State as declared by its legislature. It was not a part of the obligation of the contract. It was wholly given by law and the power that gave it could increase, diminish, or otherwise alter, or wholly take it away without violating the Federal Constitution.

Judgment affirmed.[10]

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10. *Id.* at 1010.

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From November 1934, through January 1937, the United States acquired, pursuant to the Weeks Act,[11] approximately 180,000 acres of land located in Grant, Winn and Natchitoches Parishes from Bodcaw Lumber Company and Grant Timber & Manufacturing Company. This was accomplished through eleven different conveyances—nine deeds and two expropriation judgments (Def.'s Opp.Mot.Summ.J. ¶ B, Ex's. 1-11 [Doc. 133]). Prior to that, from November 1932, through May 1934, Good Pine Oil Company acquired the mineral rights to the 180,000 acres described above, pursuant to six mineral conveyances (*Id.,* Ex's. 12-17). At the time of the acquisitions, all of the lands acquired by the United States were clearly burdened by the six mineral servitudes running in favor of Good Pine Oil Company (*Id.,* ¶ B and Def.'s Resp.Pl.'s Stat. Uncontested Fact ¶ 5 [Doc. 134]). In 1948, when the United States filed suit for declaratory judgment, Nebo Oil Company was the successor in interest to all of the Good Pine Oil Company's then outstanding mineral rights. The United States does not dispute that the current plaintiffs, via various conveyances, are successors in interest to the mineral servitudes that had been previously owned by Good Pine Oil and later Nebo Oil Company (Def.'s Opp.Mot.Summ.J. ¶ B and Def.'s Resp.Pl.'s Stat. Uncontested Fact ¶ 3).

Based on the *Nebo Oil* Fifth Circuit opinion and the stipulated facts, there can be no real dispute that: (i) At the time Act 315 of 1940 was enacted the United States owned the surface of the 180,000 acres at issue, which were burdened

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11. 1911, 36 Stat. 961 (codified in various sections of Title 16 U.S.C.). This is the enabling legislation for the National Forest System.

by mineral servitudes running in favor of Good Pine Oil Co.; (ii) In 1948, the United States sought a declaratory judgment against Nebo Oil Co. on 800 acres; (iii) The Fifth Circuit found that Act 315 of 1940 was applicable to the minerals underlying the 24,943.93 acre tract of land sold to the United States, of which the 800 acres was a part, and that those minerals were imprescriptible;[12] and (iv) plaintiffs are the current successors in interest to whatever outstanding mineral rights Good Pine Oil Co. originally acquired.

In 1972, the Supreme Court decided *Little Lake Misere.*[13] *Little Lake* established that Act 315 of 1940 did not apply to mineral servitudes burdening lands acquired by the United States pursuant to the Federal Migratory Game Bird Act. The Court used federal choice of law principles (particularly the *Clearfield Trust*[14] Doctrine) in refusing to apply Act 315 of 1940.[15] Instead, the Court applied the residual prescription rule of ten years non-use.[16]

In 1991, forty years after *Nebo Oil,* and almost twenty years after *Little Lake,* the United States Bureau of Land Management apparently took notice of the *Little Lake* opinion and began leasing and/or attempting to lease portions of the

12. *See* discussion and quotation of *Nebo Oil supra.*

13. 412 U.S. 580, 93 S.Ct. 2389 (1973).

14. 318 U.S. 363, 63 S.Ct. 573 (1943).

15. 412 U.S. at 591-94.

16. 412 U.S. at 604.

180,000 acres at issue, as to which plaintiff's claim ownership in perpetuity (Pl.'s Compl. ¶ 14, Ex. E [Doc. 1] and Def.'s Answer ¶ 14 [Doc. 17]). In February 2000, after many letters of protest and exchanges with the United States (Pl.'s Compl. ¶ 15 and Def.'s Answer ¶ 14), Petro-Hunt filed this Quiet Title action pursuant to 28 U.S.C. §§ 2201 and 2409, seeking to be declared the owners of the mineral servitudes in perpetuity and declaring the leases granted by the United States a nullity (Pl.'s Compl. ¶ 18).

SUMMARY JUDGMENT STANDARD

Under Fed.R.Civ.P. 56(c), summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." A fact is "material" if it may affect the outcome of the suit under governing law. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505 (1986). An issue is "genuine" if there is sufficient evidence so that a reasonable jury could return a verdict for either party. *Id.*

The moving party bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, admissions, and/or affidavits which it believes demonstrates the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548 (1986); *Lawrence v. Univ. of Tex. Med. Branch at Galveston,* 163 F.3d 309 (5th Cir.1999). The moving party is not required to negate the elements of the non-moving

party's case. *Lawrence,* 163 F.3d at 311. However, where the moving party bears the burden of proof on an issue, it must produce evidence that would, if uncontroverted at trial, warrant a judgment as a matter of law. *Int'l Shortstop, Inc. v. Rally's, Inc.,* 939 F.2d 1257, 1264-65 (5th Cir.1991).

Once the moving party carries its initial burden, the burden then falls upon the non-moving party to demonstrate the existence of a genuine issue of material fact. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 584-88, 106 S.Ct. 1348, 1355-56 (1986). The non-moving party "must go beyond the pleadings and designate specific facts in the record showing that there is a genuine issue for trial." *Wallace v. Texas Tech. Univ.,* 80 F.3d 1042, 1047 (5th Cir.1996) (citations omitted). This burden is not satisfied with some metaphysical doubt as to the material facts, by conclusory or unsubstantiated allegations, or by a mere scintilla of evidence. *Little v. Liquid Air. Corp.,* 37 F.3d 1069, 1075 (5th Cir.1994) (citations omitted). In the absence of any proof, the court will not assume the non-moving party could or would prove the necessary facts. *Id.*

Pursuant to Local Rule 56.1, the moving party shall file a Statement of Uncontested Facts as to which it contends there is no genuine issue to be tried. Local Rule 56.2W requires that a party opposing the motion for summary judgment set forth a "short and concise statement of the material facts as to which there exists a genuine issue to be tried." All material facts set forth in the statement required to be served by the moving party "will be deemed admitted, for the purposes of the motion, unless specifically denied." Local Rule 56.2W.

Appendix D

LAW AND ANALYSIS

A. Framing this case properly for purposes of *res judicata* analysis.

1. Numerosity of servitudes addressed.

The United States suggests that the 800 acre servitude involved in Nebo Oil is "one of 96 servitudes that, at one time, burdened the approximately 180,000 acres at issue in this case . . . . [and that] [e]ach mineral servitude involves a separate nucleus of operative fact." They further state that the "96 servitudes have different drilling and production histories." (Def.'s Opp.Mot.Sum.J. pp. 15-16 [Doc. 133]).[17] This Court does not believe that 96 separate or mini-trials are necessary for the resolution of the issue of *res judicata.* None of the servitudes had been outstanding for longer than 8 years upon the enactment of Act 315 of 1940. Therefore, this Court could not address prescription issues if *Nebo Oil,* and more specifically Act 315 of 1940, were to have preclusive effect between these parties, as none of the mineral servitudes would have ever prescribed.

2. Ripeness addressed.

The United States also raises the issue of ripeness. In the end, like prescription, it is of no import if *res judicata* is to apply. There was no reason for the United States to wait

17. The United States apparently arrived at this figure by looking at the number of mineral conveyances, number of acquisition deeds, contiguous acreage estimations and various drilling and production data.

ten years to litigate title to property whose owners claimed it would never prescribe. The issue of the application of Act 315 of 1940 was actually litigated to a conclusion. Hypothetically, if Act 315 of 1940 had been held inapplicable or unconstitutional in *Nebo Oil,* it is extraordinary to imagine that either party would have thereafter though that Act 315 of 1940 applied to any of the other factually similarly mineral servitudes. In such an event, Nebo Oil Co. would have understood that its other outstanding mineral servitudes were subject to the default rule of ten year prescription of non-use. The converse is also true and the actions of the parties for forty years after the *Nebo Oil* opinion demonstrate such.

3. Contractual language—the conveyances giving rise to the mineral servitudes and mineral reservations are similar and not subject to varying interpretation.

The operative language in all six mineral servitudes is virtually identical and all six would have been consistently interpreted under the pre- Mineral Code law—as giving rise to an ordinary mineral servitude, which was subject to prescription for ten years non-use.[18] There is nothing remarkable about the language creating these particular mineral servitudes. In regards to prescription, one of the only

18. *See* the oft-cited case *Frost-Johnson Lumber Co. v. Salling's Heirs,* 150 La. 756, 91 So. 207 (1920) and its progeny, for the creation and recognition of the mineral servitude. Under clear jurisprudence at the time, the mineral servitude was (and still is) a fixed beacon, unique to Louisiana law. Persons have in vain attempted to circumvent and impose permanent dismemberments of title (which is allowed in Texas and many other states), but this is only achievable in Louisiana by legislative fiat, such as in Act 315 of 1940.

meaningful things the parties could have done (if not also surface owners), would have been to stipulate a shorter prescriptive period than the applicable ten years. This, nor anything apart from the default rules was intended.

Turning to the mineral reservations in the conveyances to the United States (not the mineral servitudes discussed above), the government attempts to create a title quandry—"four of the deeds and one judgment, including the February 11, 1936 deed involved in Nebo Oil, created reversionary interests in the vendor if the servitudes held by Good Pine Oil prescribed, while the remaining conveyances contained no such provision." (Def.Opp.Mot.Summ.J. pg. 13 [Doc. 133]). This factual segue by the government is misleading. The attorneys who drafted such mineral reservations undoubtedly understood that Louisiana mineral law does not support reversionary interests and were also undoubtedly attempting, as with any zealous advocate, to reserve their rights to the full extent of the law.[19] This Court

19. As found by the Court of Appeals in *Nebo Oil,* "Prior to the year 1936 the United States was interested in purchasing lands in Louisiana for national forest purposes and had found that owners of large tracts of land were unwilling to sell their lands because of court decisions holding that the sale or reservation of mineral rights in Louisiana created only a right in the nature of a servitude which was subject to prescription by ten years nonuser [sic]. However, the United States Department of Agriculture, Forest Service, was not in accord with this view and on May 29, 1935, submitted to Bodcaw Lumber Company an opinion of the Assistant Solicitor of the Department of Agriculture to the effect that the prescriptive provisions of the Louisiana Civil Code would not apply to lands sold to the United States for national forest purposes." What would have created factual

(Cont'd)

examined the language referenced by the United States and finds nothing remarkable. The different clauses simply represent an elaboration of basic principles of mineral law, *e.g.*, what it takes to interrupt prescription. In other words, these were just two different versions of "plain-vanilla," boilerplate, mineral reservation language.

This Court finds that all of the mineral servitudes and reservations would be given the same effect under Louisiana law. None of the clauses utilized are so substantially different that they would give rise to some interpretation and application inconsistent with the default rules for mineral servitudes or with the mineral servitude and reservation at issue in *Nebo Oil.*

4. *The issue of the applicability of Act 315 of 1940 has been litigated.*

Through its actions, the United States has demonstrated that it no longer feels that the *Nebo Oil* judgment holds sway, even between parties in privity. This Court is addressing *res judicata.* Had the United States sought to litigate other mineral servitudes, underlying other parcels of land not related to the *Nebo Oil* litigation, the mineral servitude

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(Cont'd)

dissimilarities in these mineral reservations is if the drafters of these documents had included language about the aforementioned opinion of the Department of Agriculture. Including such language under the impression, albeit now a mistaken one, that the United States government was guaranteeing permanent severability of the minerals, would have lent itself to further examination and would have warranted the United States' invocation of alleged factual differences.

owners would not have cried preclusion or *res judicata,* they would have merely pointed to the fact that the case law was in their favor. In fact, this did occur in Cameron Parish in 1972 on lands acquired under the Federal Migratory Game Bird Act. Unsurprisingly, defendants in that litigation pointed to *Nebo Oil,* but this time the Court found Act 315 of 1940 was not applicable to then outstanding mineral interests and held that the default rule of prescription by ten years non-use applied.[20]

New decisional law was made, and now, some forty years later, the United States is using the *Little Lake Misere* case as a buffer for what it undoubtedly could not have done prior to *Little Lake Misere.* This two step approach does not short circuit the application of *res judicata,* especially in the realm of real property. The United States is relying on a change of law to undo a prior case—not merely attack the holding or decline to follow it in future litigation, but actually attempting to undo its effects, as between the parties. That is not to say that the United States has to continue to apply the holding of *Nebo Oil* in current mineral servitude disputes, merely that it cannot undo the effects of that judgment between it and the privies of Nebo Oil Co.

5. *This judgment specifically addresses res judicata/ claim preclusion—all other arguments/contentions are moot.*

This Court restates that it does not need to delve into such matters as what constitutes continguous tracts, the

20. *See* discussion of *Little Lake Misere* on pg. 675, *supra.*

number of servitudes, and whether prescription of nonuse was interrupted by good faith operations for the discovery and production of minerals. All such considerations are rendered moot by the Court's finding that *res judicata* is applicable to the entirety of this case.[21]

Unlike an analysis of prescription, contiguous acreage, or good faith drilling operations, this Court is faced with what may be viewed as a primarily legal question. The basic facts as to the location of the property in dispute and who are the ancestors in title to Nebo Oil Co. are not in dispute. What is in dispute is the preclusive effect of the *Nebo Oil* decision. Therefore, this issue is particularly ripe for disposition by summary judgment.

B. *Res Judicata* takes on increased importance in the realm of real property.

The doctrine of claim preclusion embodies a "fundamental precept of common-law adjudication," which holds that a claim or issue which parties had a full and fair opportunity to litigate should, after judgment, forever be put to rest as between those parties.[22] Likewise, the public's

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21. *See supra* note 5.

22. *Montana v. United States,* 440 U.S. 147, 153, 99 S.Ct. 970, 973 (1979). A non-exclusive list of policies supporting claim preclusion are (i) to promote fairness; (ii) to prevent inconsistent judgments and to achieve uniformity and certainty; (iii) to finalize disputes among the parties; and (iv) to conserve judicial resources. Jay Carlisle, "Second Circuit 1999-2000 Res Judicata Developments," 20 BLR 75, 77 (Summer 2000).

interest in the reliability and certainty of titles to real property is substantial and requires efficient and decisive resolution. Therefore, in matters pertaining to real property, these two interests combine to encourage strict application of the claim preclusion doctrine. This Court could not have improved on the words of the Supreme Court in *Minnesota Mining Co. v. National Co.*:[23]

> Where questions arise which affect titles to land it is of great importance to the public that when they are once decided they should no longer be considered open. Such decisions become rules of property, and many titles may be injuriously affected by their change. Legislatures may alter or change their laws, without injury, as they affect the future only; but where courts vacillate and overrule their own decisions on the construction of states affecting the title to real property, their decisions are retrospective and may affect titles purchased on the faith of their stability. Doubtful questions on subjects of this nature, when once decided, should be considered no longer doubtful or subject to change.[24]

Nevada v. United States[25] is a roughly similar case to the one at bar. In *Nevada,* the Court found that *res judicata*

23. 70 U.S. 332, 334, 18 L.Ed. 42 (1865).

24. *Id.*, (*quoted* in *Nevada v. United States,* 463 U.S. 110, 129, n. 10, 103 S.Ct. 2906, 2918, n. 10 (1983)).

25. 463 U.S. 110, 103 S.Ct. 2906 (1983).

applied, thereby preventing the United States from re-litigating issues resolved in a court approved settlement agreement involving rights to water from the Truckee River. In *Nevada,* the original settlement judgment was entered in 1944, and 29 years later the government instituted another challenge seeking additional water rights to the Truckee River for the benefit of the Pyramid Lake Indian Reservation. The Court found that all water rights from the Truckee River had been previously and conclusively decided. The Court noted that the "policies advanced by the doctrine of *res judicata* perhaps are at their zenith in cases concerning real property, land and water. . . ."[26]

C. Legal standard applicable to *res judicata* or claim preclusion.

This Court is presented with the issue of the preclusive effect of the *Nebo Oil* case on the current litigation. The classic formulation of the claim preclusion doctrine was set forth in *Cromwell v. County of Sac*:[27]

> [T]he judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other

26. *Id.*, 463 U.S. at 129, n. 10, 103 S.Ct. at 2918, n. 10.

27. 94 U.S. 351, 352, 24 L.Ed. 195 (1876).

admissible matter which might have been offered for that purpose.

The Cromwell test has been little altered. The Fifth Circuit has applied a four-part test for determining when a claim will be barred as a result of a judgment in a prior action: (i) there must be a final judgment on the merits; (ii) the prior action must have involved the same parties or their privies; (iii) the prior action must have involved the same claim; (iv) the judgment in the prior action must have been rendered by a court of competent jurisdiction.[28] This court finds that all four elements are met. Elements (i), (ii) and (iv) are not major points of contention in this litigation, although privity is briefly addressed in Part -D below. Element (iv) is where the greatest dispute lies and is addressed in Part - E below.

D. Plaintiff's share privity with Nebo Oil Co. for purposes of *res judicata.*

Privity, as one of the necessary elements for application of *res judicata,* is a rather amorphous, factual determination. Often it is utilized in a conclusory fashion—privity "is not a requirement we can satisfy through inquiry; rather the existence of 'privity' is the inquiry satisfied."[29] It has also

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28. *See Rivet v. Regions Bank of Louisiana, F.S.B.,* 108 F.3d 576, 586, *cert. granted* 118 S.Ct. 31, 521 U.S. 1152, *reversed* 118 S.Ct. 921, 522 U.S. 470, *on remand* 139 F.3d 512 (5th Cir.1997); *Travelers Ins. Co. v. St. Jude Hosp. of Kenner,* 37 F.3d 193, 195 (5th Cir.1994); and *Corporate Health Ins., Inc. v. Texas Dept. of Ins.,* 12 F.Supp.2d 597 (S.D.Tex.1998).

29. *Russell v. SunAmerica Sec., Inc.,* 962 F.2d 1169, 1174 (5th Cir.1992).

been described rather cryptically as a "close enough relationship."[30] A relevant cite is found in *Latham v. Wells Fargo Bank, N.A.*:[31]

> '[P]arties' for the purposes of res judicata does not mean formal, paper parties only, but also includes 'parties in interest, that is, those persons *whose interests are properly placed before the court* by someone with standing to represent them are bound by matters determined in the proceeding.' . . . A non-party is in privity with a party for res judicata purposes . . . if he has succeeded to the party's interest in property. . . .[32]

The concept of privity is not disputed or really addressed by the United States. The government admits that plaintiffs in this case are ancestors in title to Nebo Oil's mineral rights. Therefore, for purposes of *res judicata,* this Court finds that plaintiff's "succeeded" to Nebo Oil Co.'s "interest in the property" and that there is privity between plaintiffs and Nebo Oil Co.

E. Scope of the claim preclusion doctrine—application to this case.

The most contentious aspect of this *res judicata* inquiry is determining the scope of the claim preclusion doctrine.

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30. *Bruszewski v. United States,* 181 F.2d 419, 423 (3rd Cir.1950).

31. 896 F.2d 979 (5th Cir.1990).

32. *Id.* at 983.

In this case, that determination is whether the claim to the 180,000 acres is, for purposes of *res judicata,* the same claim which was or could have been asserted in the *Nebo Oil* litigation. The scope of *res judicata* preclusion has been enunciated in a variety of ways, *e.g.,* that it addresses all relevant issues,[33] or all claims that could have been advanced,[34] or as a corollary to the affirmative pleading rules for compulsory counterclaims and affirmative defenses.[35] The basic idea is that, "Claim preclusion or *res judicata,* bars the litigation of claims that either have been litigated or should have been raised in an earlier suit."[36]

It does not matter that the law applicable to Nebo Oil may have changed pursuant to the *Little Lake Misere*[37]

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33. *Richards v. Jefferson County, Ala.,* 517 U.S. 793, 798, 116 S.Ct. 1761, 1765 (1996) ("[A] prior judgment is generally 'res judicata not only as to all matters litigated and decided by it, but as to all relevant issues which could have been but were not raised and litigated in the suit.'" (*citation omitted*)).

34. *Goldberg v. R.J. Longo Constr. Co. Inc.,* 54 F.3d 243, 246 (5th Cir.1995) (Res judicata bars "all claims that were or *could have been* advanced in support of the cause of action on the occasion of its former adjudication . . . not merely those that were adjudicated." (*citations omitted*)).

35. *Brown v. Felsen,* 442 U.S. 127, 131, 99 S.Ct. 2205, 2209 (1979) ("Res judicata prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding." (*citations omitted*)).

36. *In re Southmark Corp.,* 163 F.3d 925, 934 (5th Cir.1999).

37. 412 U.S. 580, 93 S.Ct. 2389 (1973).

opinion. It also does not matter whether the application of claim preclusion to a particular case will result in an unfair or harsh outcome.[38] As a general rule, a change in the statutory or case law will not alter the claim preclusion effect of a prior judgment—"the res judicata consequences of a final, unappealed judgment on the merits [is not] altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case."[39]

In regards to what constitutes a claim, the Fifth Circuit accepts or at least endorses the "Same Transaction Test," found in § 24 of the Restatement (Second) of Judgments, which reads as follows:[40]

> (1) When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar . . . the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of

38. *In re Teal,* 16 F.3d 619, 622 n. 6 (5th Cir.1994) (conclusion reached by court "comports with the well-known rule that a federal court may not abrogate principles or res judicata out of equitable concerns. . . . Indeed, it must give res judicata effect to a prior judgment even if it would be voidable on appeal because of legal error" (*citations omitted*)).

39. *Federated Dept. Stores, Inc. v. Moitie,* 452 U.S. 394, 398, 101 S.Ct. 2424, 2428 (1981) (*citations omitted*).

40. *In re Southmark Corp.,* 163 F.3d 925, 934 (5th Cir.1999); *Goldberg v. R.J. Longo Constr. Co.,* 54 F.3d 243, 246 (5th Cir.1995).

> connected transactions, out of which the action arose.
>
> (2) What factual grouping constitutes a 'transaction,' and what groupings constitute a 'series' are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.

The government is not free to select a particular 800 acres, litigate over that, lose, and then re-litigate other parcels of land which are similarly situated. This practice runs afoul of the prudent observation in *United States v. Stauffer Chemical Co.,* that a party may not "litigate twice with the same party an issue arising in both cases from virtually identical facts."[41] At the time *Nebo Oil* was brought (1948), the United States was well aware of the marked shift in federal civil procedure which was ushered in with the Federal Rules of Civil Procedure in 1938. With the elimination of the distinction between law and equity, the advent of notice pleading, liberal joinder and amendment, and broad discovery rights, parties had ample opportunity to present all of their related claims and defenses in the same action.

"The United States concedes that the ownership of the mineral rights underlying the 800 acres involved in

41. 464 U.S. 165, 172, 104 S.Ct. 575, 579 (1984).

Nebo Oil was decided and cannot be revisited here." (Def.'s Opp. Mot. Summ. J., pg. 11 [Doc. 133]). This Court also finds that the Fifth Circuit applied Act 315 of 1940 to the mineral reservation and sale of the 24,943.93 acre tract to the United States, of which the 800 acres was a part. Accordingly, those minerals underlying the 24,943.93 acre tract were previously held imprescriptible and *res judicata* clearly applies.

As previously discussed, this Court finds that the five other servitudes and the later mineral reservations burdening the 180,000 acres are virtually identical to the servitude and reservation at issue in *Nebo Oil.*[42] None of the servitudes had been outstanding for longer than eight (8) years upon the enactment of Act 315 of 1940. Therefore, all of the servitudes were equally situated and susceptible to the application of Act 315. In addition, all of the surface of the disputed acreage was acquired by the United States pursuant to the Weeks Act and none of the language in such deeds or mineral reservations would have warranted a different legal conclusion at the time of *Nebo Oil.* Accordingly, this Court finds that the entire 180,000 acres was similarly situated to the 800 acres at issue in *Nebo Oil.*

From an examination of *Nebo Oil,* it is obvious that had the government elected, as plaintiff in *Nebo Oil,* to include all similarly situated acreage in that suit, it would not have

42. *See* analysis in Part A-3, *supra,* for the proposition that none of the clauses utilized are so substantially different that they would give rise to some interpretation and application inconsistent with the default rules for mineral servitudes or with the servitude at issue in *Nebo Oil.*

changed the decision of that Court. The government has had a "full and fair opportunity" to litigate the application and constitutionality of Louisiana Act 315 of 1940 to this mineral property. The government should not be allowed to litigate now that which it could have litigated 50 years ago. *Res judicata* now bars the United States from re-litigating these issues.

CONCLUSION

For the foregoing reasons, this Court finds that Plaintiff's Motion for Summary Judgement [Doc. 85] must be granted. A formal judgment, prepared by plaintiffs and approved as to form by the United States, will be signed upon presentation.

THUS DONE AND SIGNED, in Shreveport, Louisiana, on this 17 day of December, 2001.

s/ Donald E. Walter
Donald E. Walter
UNITED STATES DISTRICT JUDGE

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING PETITION FOR REHEARING FILED JUNE 1, 2004

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 02-30760

PETRO-HUNT LLC; HUNT PETROLEUM CORP; KINGFISHER RESOURCES INC

Plaintiffs - Appellees

v.

UNITED STATES OF AMERICA; ET AL

Defendants

UNITED STATES OF AMERICA

Defendant - Appellant

Consolidated With 02-30786

PETRO-HUNT LLC; HUNT PETROLEUM CORP; KINGFISHER RESOURCES INC

Plaintiffs - Appellants

v.

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UNITED STATES OF AMERICA; ASPECT RESOURCES LLC; BAYOU PETROLEUM CO; FIRST TEXAS HYDROCARBONS, INC; OSCAR C FORLAND; GULF COAST OIL & GAS CO; JUSTISS OIL COMPANY INC; MB EXPLORATION, LLC; NORTHSTAR ENERGY LLC; PALMER PETROLEUM INC; HOWELL R SPEAR; JOHN P STRANG; WHELESS TDL EXPLORATION COMPANY, LLC; OCEAN ENERGY RESOURCES INC, formerly known as UMC Petroleum Corp; DEVON SFS OPERATING INC, formerly known as Santa Fe Snyder Corp; J BRADLEY JEFFREYS; ENERGY ARROW EXPLORAION LLC; CARUTHERS PRODUCING COMPANY INC

Defendants - Appellees

Appeals from the United States District Court for the Western District of Louisiana, Shreveport

ON PETITION FOR REHEARING AND REHEARING EN BANC

(Opinion 3/31/04, 5 Cir., _____, _____ F.3d _____)

Before Judges EMILIO M. GARZA, and DENNIS, Circuit Judges, and VANCE*, District Judge.

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* District Judge of the Eastern District of Louisiana, sitting by designation.

Judges Higginbotham, Wiener, and Clement did not participate in the consideration of the rehearing en banc.

Appendix E

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. and 5TH Cir. R. 35) the Petition for Rehearing En Banc is also DENIED.

ENTERED FOR THE COURT:

s/ [illegible]
United States Circuit Judge

APPENDIX F — WEEKS ACT, CH. 186, 36 STAT. 961 (1911)

SIXTY-FIRST CONGRESS. SESS. III, CH. 186. 1911.

CHAP. 186.—An Act To enable any State to cooperate with any other State or States, or with the United States, for the protection of the watersheds of navigable streams, and to appoint a commission for the acquisition of lands for the purpose of conserving the navigability of navigable rivers.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the consent of the Congress of the United States is hereby given to each of the several States of the Union to enter into any agreement or compact, not in conflict with any law of the United States, with any other State or States for the purpose of conserving the forests and the water supply of the States entering into such agreement or compact.

SEC. 2. That the sum of two hundred thousand dollars is hereby appropriated and made available until expended, out of any moneys in the National Treasury not otherwise appropriated, to enable the Secretary of Agriculture to cooperate with any State or group of States, when requested to do so, in the protection from fire of the forested watersheds of navigable streams; and the Secretary of Agriculture is hereby authorized, and on such conditions as he deems wise, to stipulate and agree with any State or group of States to cooperate in the organization and maintenance of a system of fire protection on any private or state forest lands within such State or States and situated upon the watershed of a navigable river: *Provided*. That no such stipulation or agreement shall be made with any State which has not

provided by law for a system of forest-fire protection: *Provided further*, That in no case shall the amount expended in any State exceed in any fiscal year the amount appropriated by that State for the same purpose during the same fiscal year.

SEC. 3. That there is hereby appropriated, for the fiscal year ending June thirtieth, nineteen hundred and ten, the sum of one million dollars, and for each fiscal year thereafter a sum not to exceed two million dollars for use in the examination, survey, and acquirement of lands located on the headwaters of navigable streams or those which are being or which may be developed for navigable purposes: *Provided*, That the provisions of this section shall expire by limitation on the thirtieth day of June, nineteen hundred and fifteen.

SEC. 4. That a commission, to be known as the National Forest Reservation Commission, consisting of the Secretary of War, the Secretary of the Interior, the Secretary of Agriculture, and two members of the Senate, to be selected by the resident of the Senate and two members of the House of Representatives, to be selected by the Speaker, is hereby created and authorized to consider and pass upon such lands as may be recommended for purchase as provided in section six of this Act, and to fix the price or prices at which such lands may be purchased, and no purchases shall be made of any lands until such lands have been duly approved for purchase by said commission: *Provided*, That the members of the commission herein created shall serve as such only during their incumbency in their respective official positions, and any vacancy on the commission shall be filled in the manner as the original appointment.

Appendix F

SEC. 5. That the commission hereby appointed shall, through its president, annually report to Congress, not later than the first Monday in December, the operations and expenditures of the commission, in detail, during the preceding fiscal year.

SEC. 6. That the Secretary of Agriculture is hereby authorized and directed to examine, locate, and recommend for purchase such lands as in his judgment may be necessary to the ration of the flow of navigable streams, and to report to the National Forest Reservation Commission the results of such examinations: *Provided*, That before any lands are purchased by the National Forest Reservation Commission said lands shall be examined by the Geological Survey and a report made to the Secretary of Agriculture, showing that the control of such lands will promote or protect the navigation of streams on whose watersheds they lie.

SEC. 7. That the Secretary of Agriculture is hereby authorized to purchase, in the name of the United States, such lands as have been approved for purchase by the National Forest Reservation Commission at the price or prices fixed by said commission: *Provided,* That no deed or other instrument of conveyance shall be accepted or approved by the Secretary of Agriculture under this Act until the legislature of the State in which the land lies shall have consented to the acquisition of such land by the United States for the purpose of reserving the navigability of navigable streams.

SEC. 8. That the Secretary of Agriculture may do all things necessary to secure the safe title in the United States

to the lands to be acquired under this Act, but no payment shall be made for any such lands until the title shall be satisfactory to the Attorney General and shall be vested in the United States.

SEC. 9. That such acquisition may in any case be conditioned upon the exception and reservation to the owner from whom title passes to the United States of the minerals and of the merchantable timber, or either or any part of them, within or upon such lands at the date of the conveyance, but in every case such exception and reservation and the time within which such timber shall be removed and the rules and regulations under which the cutting and removal of such timber and the mining and removal of such minerals shall be done shall be expressed in the written instrument of conveyance, and thereafter the mining, cutting, and removal of the minerals and timber so excepted and reserved shall be done only under and in obedience to the rules and regulations so expressed.

SEC. 10. That inasmuch as small areas of land chiefly valuable for agriculture may of necessity or by inadvertence be included in tracts acquired under this Act, the Secretary of Agriculture may, in his discretion, and he is hereby authorized, upon application or otherwise, to examine and ascertain the location and extent of such areas as in his opinion may be occupied for agricultural purposes without injury to the forests or to stream flow and which are not needed for public purposes, and may list and describe the same by metes and bounds, or otherwise, and offer them for sale as homesteads at their true value, to be fixed by him, to actual settlers, in tracts not exceeding eighty acres in area,

under such joint rules and regulations as the Secretary of Agriculture and the Secretary of the Interior may prescribe; and in case of such sale the jurisdiction over the lands sold shall, ipso facto, revert to the State in which the lands sold lie. And no right, title, interest, or claim in or to any lands acquired under this Act, or the waters thereon, or the products, resources, or use thereof after such lands shall have been so acquired, shall be initiated or perfected, except as in this section provided.

SEC. 11. That, subject to the provisions of the last preceding section, the lands acquired under this Act shall be permanently reserved, held, and administered as national forest lands under the provisions of section twenty-four of the Act approved March third, eighteen hundred and ninety-one (volume twenty-six, Statutes at Large, page eleven hundred and three), and Acts supplemental to and amendatory thereof. And the Secretary of Agriculture may from time to time divide the lands acquired under this Act into such specific national forests and so designate the same as he may deem best for administrative purposes.

SEC. 12. That the jurisdiction, both civil and criminal, over persons upon the lands acquired under this Act shall not be affected or changed by their permanent reservation and administration as national forest lands, except so far as the punishment of offenses against the United States is concerned, the intent and meaning of this section being that the State wherein such land is situated shall not, by reason of such reservation and administration, lose its jurisdiction nor the inhabitants thereof their rights and privileges as citizens or be absolved from their duties as citizens of the State.

Appendix F

SEC. 13. That five per centum of all moneys received during any fiscal year from each national forest into which the lands acquired under this Act may from time to time be divided shall be paid, at the end of such year, by the Secretary of the Treasury to the State in which such national forest is situated; to be expended as the state legislature may prescribe for the benefit of the public schools and public roads of the county or counties in which such national forest is situated: *Provided*, That when any national forest is in more than one State or county the distributive share to each from the proceeds of such forest shall be proportional to its area therein: *Provided further*, That there shall not be paid to any State for any county an amount equal to more than forty per centum of the total income of such county from all other sources.

SEC. 14. That a sum sufficient to pay the necessary expenses of the commission and its members, not to exceed an annual expenditure of twenty-five thousand dollars, is hereby appropriated out of any money in the Treasury not otherwise appropriated. Said appropriation shall be immediately available, and shall be paid out on the audit and order of the president of the said commission, which audit and order shall be conclusive and binding upon all departments as to the correctness of the accounts of said commission.

Approved, March 1, 1911.

APPENDIX G — LOUISIANA ACT 315 OF 1940

ACT No. 315

House Bill No. 255. By Mr. Jack.

AN ACT

Providing that when land is acquired by conventional deed or contract, condemnation or expropriation proceedings by the United States of America, or any of its subdivisions or agencies, from any person, firm or corporation, and the act of acquisition, verdict or judgment contains a reservation of oil, gas and/or other minerals or royalties, or provides that said land passes subject to a prior sale or reservation of oil, gas and/or other minerals or royalties, still extant, said rights so reserved or previously sold shall be imprescriptible; and repealing Acts 68 and 151 of 1938 and other laws, general or special, inconsistent herewith.

Section 1. Be it enacted by the Legislature of Louisiana, That when land is acquired by conventional deed or contract, condemnation or expropriation proceedings by the United States of America, or any of its subdivisions or agencies, from any person, firm or corporation, and by the act of acquisition, verdict or judgment, oil, gas, and/or other minerals or royalties are reserved, or the land so acquired is by the act of acquisition conveyed subject to a prior sale or reservation of oil, gas and/or other minerals or royalties, still in force and effect, said rights so reserved or previously sold shall be imprescriptible.

Appendix G

Section 2. That Act 68 and Act 151 of 1938 and all other laws or parts of laws, general or special, in conflict herewith are hereby repealed.

Approved by the Governor: July 20, 1940.

A true copy:

JAS A. GREMILLION,
Secretary of State.

APPENDIX H — COMPLAINT IN *UNITED STATES v. NEBO OIL* FILED APRIL 30, 1948

TRANSCRIPT OF APPEAL

UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF LOUISIANA,
SHREVEPORT DIVISION.

No. 2379 Civil

UNITED STATES OF AMERICA,

Versus

NEBO OIL COMPANY, INCORPORATED.

Taken By Plaintiff, To The United States Court Of Appeals, Fifth Circuit, New Orleans, Louisiana.

In the District Court of the United States for the Western District of Louisiana,
Shreveport Division.

No. 2379

United States of America, Petitioner,

vs.

Nebo Oil Company, Inc., Defendant.

Appendix H

To The Honorable Judges Of Said Court:

The petition of the United States of America, a sovereign, appearing herein through Malcolm E. LaFargue, United States Attorney, and William J. Fleniken, Assistant United States Attorney, and Sol B. Pressburg, Special Attorney, United States Department of Justice, under instructions of the Attorney General of the United States of America, and respectfully represents that:

I.

This is a civil action arising under the Constitution and the laws of the United States, particularly Sec. 274(d) of the Judicial Code of the United States, commonly known as the statute authorizing declaratory judgments and the procedure therefor (being Act of March 3, 1911 as amended by Acts of June 14, 1934, and August 30, 1935; 28 USCA Sec. 400).

II.

That your petitioner is the owner in fee simple of the following described property, to wit:

Northeast Quarter (NE¼); Southeast Quarter of Southeast Quarter (SE¼SE¼); West Half of Southeast Quarter (W½SE¼); West Half of Southwest Quarter (W½SW¼); Southwest Quarter of Northwest Quarter (SW¼NW¼); East Half of West Half (E½W½); Sec. 19, T. 13 N., R. 6 W., La. M.; Southeast Quarter (SE¼); South Half of Northeast Quarter (S½NE¼); Sec 24, T. 13 N., R. 7 W., La. M.

located in the Parish of Natchitoches, State of Louisiana, acquired from the Bodcaw Lumber Company of Louisiana, Inc. by deed dated February 11, 1936 duly recorded in the conveyance records of Natchitoches Parish, Louisiana.

III.

That the Nebo Oil Company, Inc. is a corporation organized under the laws of the State of Delaware, domiciled in Wilmington, Delaware, doing business in the State of Louisiana, and they have designated Eugene Marshall and P. S. Gaharan, Jr., Jena, LaSalle Parish, Louisiana, as their agents for process.

IV.

That your petitioner further shows that at the time of the acquisition of the above described lands, they were subject to a servitude created by the prior sale on November 12, 1932, to the Good Pine Oil Company, Inc. of the oil, gas and sulphur rights thereto.

V.

That the Nebo Oil Company, Inc. claims such mineral rights as successor in title to the Good Pine Oil Company, Inc.

Appendix H

VI.

That no drilling operations were conducted on said lands during the ten year prescriptive period beginning November 12, 1932, the date Good Pine Oil Company, Inc. acquired same, and therefore any mineral rights as may have been owned by Good Pine Oil Company, Inc., or its successor, Nebo Oil Company, Inc., have prescribed under the laws of the State of Louisiana.

VII.

That the Nebo Oil Company, Inc. claims to be the owner of said mineral rights in and under the land hereinabove described and have advised your petitioner that they, or their lessee, will drill a well on said land, and further, have advised that any interference with their operation by the United States will be resisted.

VIII.

That your petitioner is entitled to a declaratory judgment resolving the question of the ownership of the minerals in and under the above described land.

IX.

That your petitioner further alleges that the Nebo Oil Company, Inc., and/or their lessees threaten to and will drill a well on the hereinabove described land and commit trespass thereon, causing your petitioner irreparable damage; that said injury cannot be adequately redressed by an action at law for

the reason that it will deprive your petitioner of its free use and ownership of said land, and your petitioner is entitled to a permanent injunction prohibiting and restraining the said Nebo Oil Company, Inc., its agents, employees, and all persons acting under, through or for said defendant, Nebo Oil Company, Inc., and/or its lessees from drilling or otherwise trespassing on the above described land.

Wherefore, premises considered petitioner prays that service and citation of this petition be made upon Nebo Oil Company, Inc. through its agents, Eugene Marshall and P. S. Gaharan, Jr., Jena, LaSalle Parish, Louisiana, and after all legal delays and due proceedings had, that a declaratory judgment be rendered in favor of plaintiff, United States of America, and against the said Nebo Oil Company, Inc. in the following respects, to wit:

(a) Decreeing that the United States of America is the owner in complete fee of the land described in the above and foregoing petition;

(b) Decreeing the ownership of the minerals, including oil, gas and sulphur, in and under the above described land, to be vested in the United States of America.

Petitioner further prays that the Nebo Oil Company, Inc. and its officers, agents, employees, lessees, assignees, and all persons acting or claiming to act on behalf of said Nebo Oil Company, Inc. and its successors and their officers, agents, employees, lessees and assignees, be perpetually enjoined and restrained from in any way drilling, leasing or trespassing on the said property of your petitioner.

Petitioner further prays that it recover the costs of this suit.

Petitioner further prays for all orders and decrees necessary and proper and for full and general relief.

(S.) MALCOLM E. LARFARGUE,
United States Attorney.
(S.) WM. J. FLENIKEN,
Assistant United States Attorney.
(S.) SOL PRESSBURG,
Special Attorney, Department of Justice.

Filed Apr. 30, 1938.

PHILIP H. MECOM,
Clerk U. S. Dist. Court, West. Dist. of La.

APPENDIX I — ANSWER AND COUNTERCLAIM IN *UNITED STATES v. NEBO OIL* FILED MAY 26, 1948

ANSWER AND COUNTERCLAIM

(Titles omitted.)

No. 2379.

Now comes Nebo Oil Company, Inc., the defendant in the above entitled and numbered cause, and answers the complaint herein as follows:

First Defense.

1. Defendant admits the allegations contained in paragraphs I, III, VII, and VIII of the petition.

2. Defendant admits that the United States of America acquired the property described in paragraph II of the petition from Bodcaw Lumber Company of Louisiana, Inc. by deed dated February 11, 1936, recorded in Book 173, Folio 400 of the Conveyance Records of Natchitoches Parish, Louisiana.

3. Defendant admits that by deed dated November 12, 1932, recorded in Book 168, Folio 419 of the Conveyance Records of Natchitoches Parish, Louisiana, Bodcaw Lumber Company of Louisiana, Inc. sold and conveyed to Good Pine Oil Company, Inc. in perpetuity all of the oil, gas and sulphur in, on and under all of the lands acquired by the United States of America under the deed dated February 11, 1936, including the oil, gas and sulphur under the lands described in paragraph

II of the petition, and that the conveyance to the United States was made subject to the prior sale of the oil, gas and sulphur to Good Pine Oil Company, Inc.

4. Defendant alleges that it now owns, as successor in title, all of the right, title and interest in and to the oil, gas and sulphur acquired by Good Pine Oil Company, Inc. by the deed dated November 12, 1932.

5. Defendant admits that no drilling operations have been conducted since November 12, 1932, on the property described in paragraph II of the petition or on any lands contiguous thereto under which the defendant owns the mineral rights.

6. Defendant admits that it or its lessees intend to drill and will drill a well on the property described in paragraph II of this complaint and have so advised the Secretary of the Interior.

7. Defendant denies each and every other allegation contained in the petition.

8. Defendant further alleges that the rights of defendant in and to the oil, gas and sulphur under the lands described in paragraph II of the petition are imprescriptible by virtue of Act 315 of the Louisiana Legislature of 1940 (Dart's Louisiana General Statutes, Section 7156.4) and that defendant now owns all of the oil, gas and sulphur in, on and under said lands.

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Second Defense.

1. In November, 1932, Bodcaw Lumber Company of Louisiana, Inc., Grant Timber & Manufacturing Company of Louisiana, Inc., Good Pine Lumber Company of Louisiana, Inc., Tall Timber Lumber Company of Louisiana, Inc., and Trout Creek Lumber Company of Louisiana, Inc. pooled and integrated all of the oil, gas and sulphur in, on and under certain large tracts of land which they owned in north central Louisiana by conveying such minerals to Good Pine Oil Company Inc. In exchange for the minerals thus conveyed, the participating corporation received all of the stock of Good Pine Oil Company, Inc., each corporation receiving stock in proportion to the acreage which it contributed.

2. The oil, gas and sulphur in, on and under the lands described in paragraph II of the petition were included in the minerals contributed to the pool by Bodcaw Lumber Company of Louisiana, Inc.

3. Within ten years after the mineral rights were pooled oil and gas were discovered on the acreage contributed by Good Pine Lumber Company of Louisiana, Inc., Tall Timber Lumber Company of Louisiana, Inc. and Trout Creek Lumber Company of Louisiana, Inc. and oil and gas has been produced from such acreage in large quantities without interruption since the date of discovery. No production has been obtained from the minerals contributed by Grant Timber & Manufacturing Company of Louisiana, Inc. and production in small quantities only has been obtained from minerals contributed by Bodcaw Lumber Company of Louisiana, Inc.

4. The income derived from such production has been and is now being distributed to all of the participants in the pooling agreement, or their stockholders, in proportion to the acreage contributed.

5. A substantial part of the minerals acquired by Good Pine Oil Company, Inc., including the oil, gas and sulphur in, on and under the lands described in paragraph II of the petition, is now owned by the defendant.

6. Production of oil and gas from the pooled minerals interrupted, and continues to interrupt, prescription with respect to all of the minerals and mineral rights included in the pool and none of the mineral rights acquired by Good Pine Oil Company, Inc. as a result of the pooling agreement, including the mineral rights now owned by the defendant in, on and under the lands described in paragraph II of the petition, will prescribe so long as production is obtained from any of the pooled minerals.

Third Defense.

1. The lands sold and transferred by Bodcaw Lumber Company of Louisiana, Inc. to the United States of America by the deed dated February 11, 1936, were acquired by the United States of America for the sole purpose of establishing a national forest and were purchased under the Weeks Act, as amended, (being Act of March 1, 1911, as amended; 16 U. S. C. A. Secs. 480, 500, 513-519, 521, 552 and 563).

2. The Louisiana Laws of prescription (Articles 789 and 3546 of the Civil Code) are inapplicable to mineral rights

reserved or excepted in conveyances of land to the United States of America for the establishment of a national forest; the rights of the parties in and to the minerals so resered or expected are fixed solely by the terms of the applicable agreements.

3. The sale and transfer to the United States of America by deed dated February 11, 1936, was, by the terms of said deed, made subject to the prior sale by Bodcaw Lumber Company of Louisiana, Inc., of all the oil, gas and sulphur in, on and under said lands to Good Pine Oil Company, Inc., said sale and transfer being made by deed dated November 12, 1932.

4. Under the terms of the deed dated November 12, 1932, all of the oil, gas and sulphur in, on and under a large tract of land in Natchitoches Parish, Louisiana, including the oil, gas and sulphur in, on and under the lands described in paragraph II of the petition, were conveyed by Bodcaw Lumber Company of Louisiana, Inc. to Good Pine Oil Company, Inc. in perpetuity.

5. Moreover, under the terms of the deed November 12, 1932, the drilling operations conducted in 1941, 1942 and 1945 on the lands covered by said deed dated November 12, 1932, preserved and extended all of the mineral rights conveyed thereby to Good Pine Oil Company, Inc.

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Fourth Defense.

1. Under date of May 4, 1935, the Solicitor of the Department of Agriculture rendered a decision ruling that the Louisiana Laws of prescription (Articles 789 and 3546 of the Civil Code) were inapplicable to mineral reservations contained in deeds conveying lands to the United States of America for national forest purposes. On April 17, 1947, the Secretary of the Interior accepted as valid and binding ruling of the Solicitor of the Department of Agriculture dated May 4, 1935.

2. The decision of the Solicitor of the Department of Agriculture dated May 4, 1935, was based on the following finding of fact:

"Owners of large tracts of land do not wish to sell their lands to the United States for National Forest purposes unless they can reserve to themselves the oil and gas rights for longer periods than ten years and want assurance that these rights will not be prescribed by non-user of ten years."

3. Prior to February 11, 1936, a copy of the Solicitor's decision dated May 4, 1935, was forwarded to Bodcaw Lumber Company of Louisiana, Inc. by the representatives of the United States who were negotiating the sale.

4. Thereafter, Bodcaw Lumber Company of Louisiana, Inc., through its duly authorized agents, executed and delivered to the United States of America the deed dated February 11, 1936.

5. In reliance upon the decision of the Solicitor of the Department of Agriculture dated May 4, 1935, and in reliance upon prior assurances by representatives of the United States that the minerals owned by Good Pine Oil Company, Inc. were not subject to the Louisiana laws of prescription, the defendant has not exercised its mineral rights in and under some of the lands conveyed to the United States of America by the deed dated February 11, 1936, including the mineral rights in and under the lands described in paragraph II of the petition.

6. The plaintiff cannot now reject the decision of the Solicitor of the Department of Agriculture dated May 4, 1935, and the decision of the Secretary of the Interior dated April 17, 1947, and assert that the mineral rights reserved and excepted in the deed dated February 11, 1936, have prescribed under Articles 789 and 3546 of the Civil Code of the State of Louisiana.

Counterclaim.

1. The conveyance of land by Bodcaw Lumber Company of Louisiana, Inc. to the United States of America by deed dated February 11, 1936, was based on the assumption that the mineral rights previously sold and conveyed in Good Pine Oil Company, Inc. by deed dated November 12, 1932, would not be subject to prescription under Articles 789 and 3546 of the Civil Code of the State of Louisiana.

2. The conditions of the sale to the United States of America and the price fixed for the land sold were based on the assumption that the minerals under the land sold were

vested in perpetuity in Good Pine Oil Company, Inc. or its successors and would not revert to the United States of America by prescription.

3. It the Court holds that the mineral rights conveyed to said Good Pine Oil Company, Inc. are subject to prescription under Articles 789 and 3546 of the Civil Code of the State of Louisiana, the sale of land by Bodcaw Lumber Company of Louisiana, Inc. to the United States of America and the deed dated February 11, 1936, were based on a mistaken assumption.

4. If the Court cancels the conveyance dated February 11, 1936, defendant is willing to, and shall, repay the United States of America the sum paid for the land conveyed by such deed, plus interest at the legal rate.

Wherefore, the defendant prays that:

(1) A declaratory judgment be rendered in favor of defendant, Nebo Oil Company, Inc., and against the United States of America decreeing that the minerals, including oil, gas and sulphur, in, on and under the lands described in paragraph II of the petition be vested in Nebo Oil Company, Inc.; or

(2) In the alternative, a decree be entered canceling the conveyance of land covered by the deed dated February 11, 1936.

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Petitioner further prays for all others and decree necessary and proper and for full and general relief.

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Certificate Omitted.

Filed May 26, 1948.

PHILIP H. MECOM,
Clerk U. S. Dist. Court West. Dist. of La.

APPENDIX J — BRIEF FOR THE UNITED STATES IN *UNITED STATES v. NEBO OIL* FILED FEBRUARY 24, 1950

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA SHREVEPORT DIVISION

Civil Action No. 2379

United States,

Plaintiff

v.

Nebo Oil Company, Inc.,

Defendant

BRIEF FOR THE UNITED STATES

Statement

This action was instituted to obtain a declaratory judgment as to the ownership of mineral rights involved in, and for an injunction restraining the defendant from drilling on, certain lands in Natchitoches Parish, Louisiana, which are described as follows:

> Northeast quarter (N¼); southeast quarter of southeast quarter (SE¼SE¼); west half of southeast quarter (W½ SE¼); west half of southwest quarter (W½SW¼); southwest quarter

> of northwest quarter (SW¼W4); east half of west half (E½W½); Sec. 19, T. 13 N., R. 6 W., La. M.; southeast quarter (SE¼); south half of northeast quarter (S½NE¼); Sec. 24, T. 13 N., R. 7 W., La. M.

These lands were acquired by the United States for inclusion in the Kisatchie National Forest under the provisions of the Weeks Act (Act of March 1, 1971, 36 Stat. 961), from the Bodcaw Lumber Company, by deed dated February 11, 1936 (Ex. G-1). At the time the lands were conveyed to the United States they were subject to a servitude created by a prior sale on November 12, 1932, by the Bodcaw Lumber Company to the Good Pine Oil Company of oil, gas and sulphur rights (Ex. G-2).

The sale of mineral rights of November 12, 1932, by the Bodcaw Lumber Company to the Good Pine Oil Company covered approximately 37,500 acres of land of which the lands involved in this case were a part (Ex. Nebo-2). The instrument granting the mineral rights contained the following provision:

> * * * it being expressly stipulated that none of said rights in any of said lands shall be prescribed unless there shall elapse a FULL PERIOD OF TEN (10) YEARS in which there shall be no exercise of any of the foregoing rights or user of any of the lands aforesaid under and by virtue hereof.

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The deed of February 11, 1936, from the Bodcaw Lumber Company to the United States covered approximately 25,000 acres of land of which the lands in suit were a part, and contained certain provisions, among others, purporting to reserve to the grantor all of the oil, gas and sulphur in the lands conveyed, as follows:

> This sale and transfer is made subject to the sale of all the oil, gas and sulphur, in, on, and under all of the lands conveyed herein as shorn by act of sale dated November 12, 1932, * * * wherein Bodcaw Lumber Company of Louisiana, Incorporated, was the vendor, and Good Pine Oil Company, Incorporated, was the vendee. The mention of these mineral sales and of the rights granted therein is made solely for the purpose of limiting vendor's warranty to the United States of America in the present sale, and the recital of the said mineral sales shall in no wise extend or enlarge the same in point of time, or limit, control, or otherwise restrict the manner of exercising its rights by the Good Pine Oil Company, Incorporated, its successors and assigns.
>
> * * *
>
> There are also specially reserved by and unto the Bodcaw Lumber Company of Louisiana, Incorporated, the vendor herein, all the oil, gas and other minerals in, on and under all of the land conveyed herein and which is subject to the two

> sales to the Good Pine Oil Company, Incorporated, mentioned above, for a period of ten years after the expiration of the rights of the said Good Pine Oil Company, Incorporated, under the laws of the State of Louisiana.
>
> * * *
>
> At the termination of the ten (10) year period, if not extended, or at the termination of any extended period * * * the right to drill for and remove oil and gas and to mine and remove minerals shall terminate, and a complete fee in the land become vested in the United States.

It was stipulated at the pre-trial conference held on November 8, 1949, and at the trial that no drilling operations have been conducted since November 12, 1932, on the lands involved in this action or on any lands contiguous thereto (Tr. 2-3; Ex. G-3, G-4).

The Nebo Oil Company, Inc., claims the mineral rights as successor in title to the Good pine Oil Company (Ex. Nebo-42, pp. 10, 13; Nebo-46, pp. 10, 13). It is alleged in the complaint and admitted in the amended answer that the defendant intends to drill a well on the lands described in the complaint and that the defendant has informed the Secretary of the Interior that it will resist any interference by the United States with such proposed drilling operations complaint, par: VII, IX; amended answer, par. 7, 9).

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Questions Presented

1. Whether the mineral rights to the lands in suit which were granted in 1932 by the Bodcaw Lumber Company to the Good Pine Oil Company have become prescribed and the rights of the Nebo Oil Company, Inc., thereto have been extinguished.

2. Whether Louisiana Acts 19110, No. 315, providing that where land is acquired by the United States subject to a prior sale or reservation of oil, gas and other minerals, such rights so reserved or previously sold shall be imprescriptible, is to be construed as being prospective in its operation.

3. If Louisiana Acts 1940, No. 315, is held to be retrospective or retroactive in its operation, then

A. Whether the act is unconstitutional as impairing the obligation of contracts in violation of Section 10, Article I of the Constitution of the United States and

B. Whether the act is unconstitutional as violating Section 1, Amendment XIV of the Constitution of the United States in denying to the United States the equal protection of the law and depriving it of property without due process of law.

4. Then, alternatively and additionally, whether the evidence which the defendant attempted to introduce over the objection of the Government in support of its contention

that the sale of minerals in 1932 from the Bodcaw Lumber Company to the Good Pine Oil Company was part of a "pooling agreement" is admissible.

5. Whether such evidence, if admissible, tends to establish a "pooling agreement" under Louisiana law whereby the drilling of a well on any tract covered by the agreement would interrupt the running of the ten-year prescriptive period as to the entire area whether contiguous or not.

Argument

I

The mineral rights granted by the Bodcaw Lumber Company on November 12, 1932, to the Good Pine Oil Company covering the lands in suit have become prescribed and are vested in the United States.

The defendant, Nebo Oil Company, Inc., who claims title to the mineral rights as successor to the Good Pine Oil Company, has admitted in its amended answer and stipulated at the pre-trial hearing and at the trial of this case that no drilling operations have been conducted on any of the lands involved or on any contiguous lands (amended answer, par. 6; Tr. 2-3; Ex.. G-3, G-4).

Under Louisiana law a reservation, grant or sale of minerals creates only an incorporeal interest in-the nature of a servitude. *Frost-Johnson Lumber Company* v. *Salling's Heirs*, 150 La. 756; *Wemple* v. *Nabors Oil and Gas Company*, 154 La. 483; *Deas* v. *Lane*, 202 La. 933; *Standard Oil Company* v. *Futral*, 204 La. 215.

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Articles 789, 3529 and 3546 of the Revised Louisiana Civil Code provide that the non-use of such mineral rights for a period of ten years will cause the servitude to become prescribed and extinguished. *Frost Lumber Industries* v. *Republic Production Company* , 112 F. 2d 462 (C.C.A. 5, 1940), cert. den. 311 U. S. 676; *Porter-Wadley Lumber Company* v. *Bailey*, 110 F. 2d 974 (C.C.A. 5, 1940), cert. den. 311 U. S. 680; *Lewis* v. *Bodcaw*, 167 La. 1067; *Gaines* v. *Crichton*, 187 La. 345; *Achee* v. *Gaillouet*, 197 La. 313; *Deas* v. *Lane*, 202 La. 933; *Bodcaw* v. *Magnolia Petroleum Company*, 167 La. 847.

The deed from the Bodcaw Lumber Company to the United States dated February 11, 1936, contains a provision, quoted above, purporting to reserve to the grantor all the oil, gas and other minerals in the land subject to two sales to the Good Pine Oil Company (one of which was the sale of November 12, 1932) for a period of ten years after the expiration of the rights of the Good Pine Oil Company under the laws of the State of Louisiana. It was further provided in the deed that at the termination of the ten-year period the right to drill for and remove oil and gas and to mine and remove minerals should terminate and a complete fee in the land become vested in the United States if the mineral rights reserved had not been exercised during the ten-year period. It is well settled under Louisiana law that any attempt by the parties to create a reservation of mineral rights for a period longer than ten years is of no effect, and if the mineral rights have not been exercised within the ten-year period the servitude is extinguished. *Porter-Wadley Lumber Co.* v. *Bailey*, 110 F. 2d 974 (C.C.A. 5, 1940), cert. den. 317 U. S. 680; *Munn* v. *Wadley*, 192 La. 874; *Baker* v. *Wilder*, 204 La.

759; *Hodges* v. *Norton*, 200 La. 614. Consequently, the attempted reservation by the Bodcaw Lumber Company in the deed to the United States of all mineral rights held by the Good Fine Oil Company for a period of ten years after the expiration of the Good Pine Oil Company's rights is therefore invalid and the mineral rights became prescribed and extinguished in November 1942, which was ten years after the grant to the Good Pine Oil Company, there having been no exercise or user of the rights during the original ten-year period. The United States therefore is the owner and holder of the fee simple title to these lands since the lapse of the servitude inures to the benefit of the party owning the land at the time of the prescription or extinguishment of the mineral rights. *Gulf Refining Co.* v. *Orr*, 207 La. 917; *McDonald* v. *Richard*, 203 La. 155; *Ohio Oil Co.* v. *Ferguson*, 213 La. 183, 215.

II

Louisiana Acts 1910 No. 315 should be construed as being prospective in operation and as having no application to this case.

The lands involved in this case were acquired by the United States by warranty deed dated February 11, 1936 (Ex. G-1). In 1940 the Legislature of the State of Louisiana passed an act which purported to render imprescriptible all mineral rights reserved or previously sold where the land subject to such servitude is acquired by the United States. Act No. 315 of 1940 (5 Darts La. Gen. Stats., sec. 7156.4). This act provides in part as follows:

> When land is acquired by conventional deed or contract * * * by the United States of America

> * * * from any person, firm or corporation, and by the act of acquisition * * * oil, gas and/or other minerals or royalties are reserved, or the land so acquired is by the act of acquisition conveyed subject to a prior sale or reservation of oil, gas and/or other minerals or royalties, still in force and effect, said rights so reserved

This act, if valid, can have a prospective operation only and should not be held to apply to any transactions which occurred prior to its enactment since this would be contrary to Article 8 of the Louisiana Revised Civil Code, which provides:

> A law can prescribe only for the future; it can have no retrospective operation, nor can it impair the obligation of contracts.

There is nothing in the text of the act to indicate that it was intended to have a retrospective or retroactive application. It will be noted that the act applies only where land "*is*" acquired by the United States and not where land "*has been*" acquired by the united States, i.e., the present tense (1940) is used and no mention is made of acquisitions made prior to the act.

> A new provision in Act 315 of 1940 spells out the imprescriptibility of a mineral servitude created prior to acquisition of the land by the United States if the act of acquisition is made expressly "subject to" that servitude. *It should be noted that the 1940 statute does not contain a provision which makes*

> *it apply to conveyances to the federal government prior to its enactment.* * * * [Underscoring supplied.] 22 Tulane L. Rev. 500.

It is submitted therefore that at most the act should be construed as having a prospective operation and should not be held to have any application to the conveyance from the Bodcaw Lumber Company to the United States of February 11, 1936.

The defendant may contend that Act No. 315 of 1940 is remedial or procedural in nature and therefore should be held to be retrospective in its operation. There is a clear and important distinction and difference between statutes which relate to purely procedural matters and those which affect substantive rights, remedies and the exercise of such rights and remedies. Those relating to remedial or procedural matters may have a retrospective operation, but statutes which affect substantive rights and remedies can have only a prospective application. 12 Am. Jur., Const. Law, sec. 431, 432. For example, see Louisiana Acts 1938, No. 205, which provides in part as follows:

> Section 1. Oil, gas and other mineral leases, and contracts applying to and affecting such leases or the right to reduce oil, gas or other minerals to possession, together with the rights, privileges and obligations resulting or flouting therefrom, are hereby defined and classified as *real rights* and *incorporeal immovable property* and may be asserted, protected and defended in the same manner as may be the ownership or possession of

other immovable property by the holder of such rights. * * *

Section 2. This act shall apply to all such transactions whether entered into prior to the passage of this act or not.

This statute classifying mineral rights as real rights and incorporeal immovable property has been held to be remedial and procedural in character and therefore retroactive or retrospective in its operation. *Tyson* v. *Surf Oil Co.*, 195 La. 248; *Allison* v. *Wideman*, 210 La. 314. This Court held the act to be merely remedial and procedural since it does not change any substantive rights. *Coastal Club* v. *Shell Oil*, 45 F. Supp. 859 (W. D. La. 1942). This Court also held the 1938 act, which in effect declares a lessee of mineral rights to have a real right assertable in the courts, to be procedural and that the act does not change or affect the substantive law of mineral servitude or the prescriptive period for asserting the right. *Colgin* v. *Harris*, 27 F. Supp. 798 (W. D. La. 1939). To the same effect see *Lawrence v. Sun Oil Co.*, 166 F. 2d 466 (C.C.A. 5, 1948).

In the present case, however, the sale of minerals by the Bodcaw Lumber Company to the Good Pine Oil Company in 1932 and the deed from the Bodcaw Lumber Company to the United States in 1936 related to mineral rights which by the 1938 act were made real rights and incorporeal immovable property. The sale of minerals to the Good Pine Oil Company and the conveyance to the United States also contained specific provisions and agreements relating to the mineral rights. Consequently, the 1940 act, if retroactive or

retrospective in operation, clearly affects *substantive* rights and cannot be said to be merely "remedial" or "procedural" in character as in the case of Act No. 204 of 1938. Act No. 315 of 1940 cannot be said to be a statute of limitations in the ordinary sense since it in effect divests the United States of a right of property and attempts to make outstanding mineral rights valid forever.[1]

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1. Exhibit Nebo-125 which was admitted over the objection of the Government is a copy of a judgment and reasons for judgment *in* the case of *Whitney National Bank of New Orleans* v. *Little Creek Oil Company, Inc., and Nebo Oil Company, Inc.*, No. 274-518 in the Civil District Court or the Parish of Orleans, State of Louisiana, where Act No. 315 of 1940 was held to be retrospective in effect. On appeal the judgment was reversed by the Supreme Court of Louisiana. *Whitney Nat. Bank* v. *Little Creek Oil Co.*, 212 La. 949.

In that case the Nebo Inc., as lessor, entered into a mineral lease in 1947 with the Little Creek Oil Company, Inc., as lessee, covering certain lands in Sec. 19, T. 13 N., R. 6 W. (of which the lands in suit are a part), and the consideration was deposited with the bank under an escrow agreement pending examination of title. A dispute arose between the lessor and lessee concerning the validity of the lessor's title. The bank deposited the consideration in the registry of the court and interpleaded both the lessor and lessee. The Little Creek Oil Company demanded cancellation of the lease and return of the consideration upon the ground that the lessors mineral rights had prescribed under Louisiana law. The Nebo Oil Company, Inc., contended that the mineral rights were imprescriptible under Act 315 of 1940. The Little Creek Oil Company had pleaded the unconstitutionality of the 1940 act. A judgment in favor of the Nebo oil Company, Inc., was reversed and the suit dismissed for nonjoinder of necessary parties, the court holding that the constitutional issues could not be passed upon in the absence of the United States as a party in the case.

Moreover, if the 1940 act is held to be applicable to this case as being retrospective in operation, it would constitute an interference, with the use by the United Sates of its property and its right of disposal and regulation arising under Art. IV, sec. 3, cl. 2, U. S. Const. It is true that in acquiring these lands the United States did not obtain exclusive jurisdiction over them, but the state has legislative jurisdiction over the lands only insofar as the exercise of that jurisdiction is consistent with federal functions. Title 16, U.S.C. sec. 480; *Wilson* v. *Cook*, 327 U. S. 474, 487. It is for this reason that only those laws in effect at the time the United States acquired the property should be held to apply. *Arlington Hotel Co.* v. *Font*, 278 U. S. 439; *Williams* v. *Arlington Hotel Co.*, 22 F. 2d 669 (C.C.A. 8, 1927); *Capetola* v. *Barclay White Co.*, 139 F. 2d 556 (C.C.A. 3, 1943), cert. den. 321 U. S. 799; *James Stewart Co.* v. *Sadrakula*, 309 U. S. 94. It is well settled that where the United States has not acquired exclusive jurisdiction over its lands within a state, the lands remain as part of the states territory and within the operation of its laws except that the state may not affect the title of the United States or interfere with it in the use of the lands or with the Government's right of disposal and regulation. *Utah Power and Light Co.* v. *United States*, 243 U. S. 389; *James* v. *Dravo Construction Co.*, 302 U. S. 134, 141; *Surplus Trading Co.* v. *Cook*, 281 U. S. 647, 650. In the case of *United States* v. *Allegheny County*, 322 U. S. 174, the court said at page 182:

> The Constitution provides that "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United

States . . ." Art. IV, § 3, cl. 2. It also gives Congress the power "To make all Laws which shall be necessary and proper for carrying into Execution" all powers vested in the Government or in any department or officer thereof, Art. 1, § 8, cl. 18, and it makes the Laws of the United States enacted pursuant thereto "the supreme law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Art. VI, cl. 2.

* * *

* * * The purpose of the supremacy clause was to avoid the introduction of disparities, confusions and conflicts *which would* follow if the Government's general authority were subject to local controls. The validity and construction of contracts through which the United States is exercising its constitutional functions, their consequences on the rights and obligations of the parties, the titles or liens which they create or permit, all present questions of federal Law not controlled by the Law of any State. *Clearfield Trust Co.* v. *United States*, 318 U. S. 363; *Jackson County* v. *United States*, 308 U. S. 343; *Carpenter* v. *Shaw*, 280 U. S. 363; *Utah Power & Light Co.* v. *United States*, 243 U. S. 389; *United States v. Ansonia Brass & Copper Co.*, 218 U.S. 452; see *D'Oench, Duhme & Co. v. Federal Deposit Ins. Corp.*, 315 U. S. 447; *Deitrick v. Greaney*, 309 U. S. 190; *Federal Land Bank* v. *Bismarck Lumber Co.*, 314 U. S. 95. * * *

Appendix J

III

Louisiana Acts 1940 No. 315 if retrospective in its application, is unconstitutional as impairing the obligation of contracts in violation of Sec. 10, Art. 1 of the Constitution of the United States.

The grant of mineral rights in 1932 by the Bodcaw Lumber Company to the Good Pine Oil Company specifically provided that none of the mineral rights should be prescribed unless a period of ten years should elapse in which there was no exercise or user of the mineral rights granted (Ex. G-2). The deed from the Bodcaw Lumber Company to the United States in 1936 not only was a conveyance but also a contract containing several agreements, conditions and provisions. One of the provisions was to the effect that the mention of the mineral sales and of the rights granted therein to the Good Pine oil Company in 1932 "*shall in no wise extend or enlarge the same in of time*, or limit, control or otherwise restrict the manner of exercising its rights by the Good Pine Oil Company, Incorporated, its successors and assigns." [Underscoring supplied.] The grant of minerals to the Good Pine Oil Company and the deed to the United States constitute definite agreements under the law then existing that the mineral servitude should not extend for a period longer than ten years, if the rights to the minerals were not exercised during that period. *Frost Lumber Industries* v. *Republic Production Company*, 112 F. 2d 462 (C.C.A. 5, 1940), cert. den. 311 U. S. 676; *Porter-Wadley Lumber Company* v. *Bailey*, 110 F. 2d 974 (C.C.A. 5, 1940), cert. den. 311 U. S. 680; *Lewis* v. *Bodcaw*, 167 La. 1067; *Gaines* v. *Crichton*, 187 La. 345; *Aches* v. *Gaillouet*, 197 La. 313; *Deas* v. *Lane*,

202 La. 933; *Bodcaw* v. *Magnolia Petroleum Company*, 167 La. 847; *Munn* v. *Wadley*, 192 La. 874; *Baker* v. *Wilder*, 204 La. 759; *Hodges* v. *Norton*, 200 La. 614. See *Haas* v. *Board of Commissioners*, 206 La. 378; *Shreveport Long Leaf Lumber Company* v. *Wilson*, 195 La. 814; *Davis' Heirs* v. *Elkins*, 9 La. 135; *State* v. *Bermudez*, 12 La. 352.

The general role is stated in 12 Am. Jur. Const. Law, sec. 386 (p. 14), as follows:

> Sec. 386. *Existing Laws as Establishing Obligations*. - Conformably to the well-established rule that the laws which subsist at the time and place of making a contract enter into and form a part of it as if they were expressly referred to, or incorporated in, its terms, the obligation of a contract is measured by the standard of the laws in force at the time it was entered into, and its performance is to be regulated by the terms and rules which they prescribe. * * *

By Louisiana Acts 1938, No. 205, mineral leases, contracts affecting such leases and mineral rights were defined and classified as real rights and incorporeal immovable property. In the case of *Trustees of Dartmouth College* v. *Woodward*, 17 U. S. 518, it was held that all incorporeal hereditaments are valuable in law and whenever they are the subject of a contract or grant they are as much within the reach of the constitutional provision prohibiting states from passing laws impairing contractual obligations as any other grant. On this point see also *Treigle* v. *Acme Homestead Assn.*, 297 U. S. 189; *Coolidge* v. *Long*, 282

U. S. 582. Consequently the laws in effect at the time of the grant of the mineral rights to the Good Pine Oil Company and the conveyance to the United States must be deemed to have entered into and formed a part of those agreements in the same manner as if they were expressly referred to or incorporated in their terms. *Van Hoffman* v. *City of Quincy*, 71 U. S. 535, 550. It has also been held that any law which, in its operation, amounts to a denial or obstruction of rights accruing by contract, though professing to act only on the remedy, violates the constitutional inhibition against legislation impairing the obligation of contract. *Pritchard* v. *Norton*, 106 U. S. 124. Undoubtedly, a statute which does not affect substantive rights or remedies may have a retrospective operation, but where it interferes with contractual or property rights it cannot be said to be merely remedial or procedural, and thus it must be construed to have only a prospective application, if otherwise valid. The test has been well stated in 12 Am. Jur., Const. Law, sec. 434 (p. 74), as follows:

> A general test which is used frequently is that the obligation of a contract is impaired where *the remedy is taken away or abolished*, the legal obligation is diminished, suspended or destroyed by relaxing or *abolishing the legal remedy*, or the proceedings for enforcement are burdened with new conditions or restrictions. A more particular test frequently advanced is that only such repeals or changes of any of the remedies existing as to the enforcement of a contract as serve to lessen the value of an agreement or which substantially interfere with, abridge, obstruct, or *unreasonably delay* rights thereunder impair the obligation. [Underscoring supplied.]

Appendix J

It is submitted that the 1940 act providing that outstanding *min*eral rights shall be imprescriptible when land is acquired by the United States impairs the obligation of contract since the act not only removes but in effect abolishes any remedies as to the mineral rights and substantially interferes with and unreasonably delays the exercise by the United States of its rights to the minerals.

IV

Louisiana Acts 1940, No. 315 is unconstitutional as denying to the United States the equal protection of the law and depriving it of property without due process of law in violation of section 1, Amendment XIV, of the Constitution of the United States.

U. S. Const. Amend. XIV, sec. 1, provides that no state shall "deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[2] Act No. 315 of 1940 clearly discriminates against the United States. Mineral rights previously sold or reserved are made imprescriptible by the act only when the United States acquires land subject to such mineral rights. The act is not made applicable to any other owner of land, the result being that every owner of land in Louisiana, except the United States, obtains title to outstanding mineral rights in the land if there has been no exercise or user of the rights for a period

2. For cases holding that the United States is a person see *United States* v. *Cooper Corp.*, 312 U. S. 600; *Stanley* v. *Schwalby*, 147 U. S. 508, 517; *Ohio* v. *Helvering*, 292 U. S. 360, 370; *Helvering* v. *Stockholms, etc., Bank*, 293 U. S. 84, 92.

of ten years. *Gulf Refining Co.* v. *Orr*, 207 La. 915; *McDonald* v. *Richard*, 203 La. 155; *Ohio Oil Co.* v. *Ferguson*, 213 La. 183, 215. Under such circumstances the United States, as the owner of land in Louisiana, has been denied the equal protection of the laws. *Pavel* v. *Pattison*, 24 F. Supp. 915 (W. D. La. 1938). That case involved a Louisiana statute (No. 80 of 1926) which purported to deny to nonresident owners of land in Louisiana the right to trap alligators and furbearing animals unless such owners had resided continuously within the state for one year preceding the opening of the trapping season. A three-judge court held the act to be unconstitutional and restrained its enforcement as depriving nonresident owners of a property right and denying to them the equal protection of the laws. The court said at pp. 918-919 of the opinion:

> If the State, under the circumstances disclosed in the present case, can prevent the non-resident owner of land from exercising the right to trap it on equal terms with citizens of the State, by denying to him a license or permit except on the condition of his becoming a resident of the State for one year, then it could make the term ten or twenty years, just as well, and which would be, for all practical purposes, to deny it altogether.
>
> * * *
>
> * * * The plaintiff Pavel is entitled to deal with his property on an equal footing with other landowners residing in the State * * *.

See also *Pavel* v. *Richard*, 28 F. Supp. 992 (W. D. La. 1938).

Thus in the present case Act No. 315 of 1940 discriminates against the United States in depriving it of a property right and does not permit the Government to deal with its property within the state on an equal footing with other landowners, whether resident or nonresident. It is submitted that under the decision in *Pavel* v. *Pattison*, *supra*, if Act No. 315 of 1940 had provided that the prescriptive period as to the United States should be twenty years (the period being ten years for all other landowners), the act would be unconstitutional as denying to the United States the equal protection of the laws. Act No. 315, however, went even further and provided that where the United States acquires land subject to mineral rights reserved or previously sold, such rights shall be imprescriptible, and thereby absolutely denies to the United States the right to obtain title to the reserved mineral rights by any lapse of time whatsoever although a ten-year period of prescription applies in the case of all other owners. Other cases directly in point are *Toomer* v. *Witsell*, 334 U. S. 385; *Rockton & Rion Ry.* v. *Davis*, 159 F. 2d 291 (C.C.A. 4, 1946), cert. den. 324 U. S. 880; *Caldwell* v. *Alabama Dry Dock & Shipbuilding Co.*, 161 F. 2d 83 (C.C.A. 5, 1947), cert. den. 332 U. S. 759.

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V

The Government's objections to the introduction of evidence by the defendant in support of its contention that the sale of mineral rights of November 12, 1932, from the Bodcaw Lumber Company to the Good Pine Oil Company was part of a "pooling agreement" should be sustained.

At the trial the defendant attempted to introduce evidence to establish that the sale of mineral rights of November 12, 1932, from the Bodcaw Lumber Company to the Good Pine Oil Company was part of a "pooling agreement." The Government objected to the introduction of such evidence' as violating Article 2276 of the Revised Civil Code of Louisiana and as being an attempt to vary, alter or contradict by parol evidence the terms of a written instrument (Tr. 8-10, 32-33, 37-39, 59-62). The court tentatively admitted the evidence burdened with the objections made by the Government subject to a later ruling as to its admissibility (Tr. 9, 11, 35, 36, 37, 38, 62-63, 87-87).

There is nothing in the instrument granting the mineral rights to the Good Pine Oil Company which indicates in any way that such grant was part of or intended to be part of a "pooling agreement." Consequently, any evidence attempting to vary, alter or contradict the terms of the sale is inadmissible, Article 2276 of the Revised Civil Code of Louisiana. *Wier* v. *Texas Co.*, 79 F. Supp. 299 (W. D. La. 1948). In that case, which was decided by this Court, it was held that evidence attempting to vary, alter or contradict by parol evidence the terms of a written agreement of sale and a

deed was inadmissible, citing *Hanby* v. *Texas Co.*, 140 La. 189; *Walker* v. *Fershaud*, 210 La. 283; *Monroe Investment Co.* v. *Ford*, 168 La. 475, *Locascio* v. *First State Bank & Trust Co.*, 168 La. 723. It may also be pointed out that by virtue of Louisiana. Acts 1938, No. 205, mineral leases and contracts applying to such leases as well as mineral rights are classified as real rights and incorporeal immovable property. Since the instrument granting the minerals and mineral rights to the Good Pine Oil Company relates to an interest in real property, the parol evidence rule should be applied and the Governments objections sustained. It was held in the case of *Hatch* v. *Morgan*, 12 So. 2d 476 (La. App.) that a sale of minerals and mineral rights is a sale of a "real right" in legal contemplation, and parol testimony is inadmissible to contradict, alter or vary the sale.

VI

The evidence offered by the defendant, even if admissible does not establish that the sale of minerals and mineral rights by the Bodcaw Lumber Company to the Good Pine Oil Company of November 12, 1932, was part of a "pooling agreement" under Louisiana law.

The evidence in support of the defendants contention that the sale of minerals and mineral rights by the Bodcaw Lumber Company to the Good Pine Oil Company of November 12, 1932, covering the lands in suit was part of a "pooling agreement" may be summarized as follows: In 1932 and 1934 the Bodcaw Lumber Company, the Grant Timber & Manufacturing Company, the Good Pine Lumber

Company, the Tall Timber Lumber Company and the Trout Creek Lumber Company by separate instruments granted to the Good Pine Oil Company the oil, gas and sulphur and mineral rights thereto in approximately 400,000 acres of land in Bienville, Bossier, Webster, Winn, Natchitoches, Grant, LaSalle and Catahoula Parishes (Ex. Nebo-2 - Nebo-19, inclusive). The sale of minerals of November 12, 1932, by the Bodcaw Lumber Company to the Good Pine Oil Company (Exs. G-2, Nebo-2) covered approximately 37,500 acres of land in Natchitoches Parish, of which the lands in suit were a part. In all, the five companies mentioned above executed seventeen separate sales of minerals. The consideration for the sale of minerals and mineral rights was the issuance of stock by the Good Pine Oil Company to the five timber and lumber companies in proportion to the acreage covered by the grants of minerals and mineral rights (Ex. Nebo-40). in 1934, 1935 and 1936 the United States acquired title to approximately 185,000 acres of these lands by purchase or condemnation (Exs. Nebo-67, Nebo-68). Thereafter the Good Pine Oil Company was dissolved and the mineral rights held by the company transferred to its stockholders, the five timber and lumber companies having been dissolved in the meantime (Tr. 131-132; Ex. Nebo-42). These stockholders then formed three corporations - the Nebo Oil Company, Inc., the Little Creek Oil Company and the Olla Oil Company (Tr. 132), and the mineral interests held by the former stockholders of the Good Pine Oil Company were transferred to these three corporations in 1942 (Tr. 132-133; Exs. Nebo-45, Nebo-46). The Little Creek Oil Company and the Olla Oil Company were dissolved and their holdings were purchased by the Nebo Oil Company, Inc., in 1948 (Tr. 134).

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The various sales of minerals by the five timber and lumber companies to the Good Pine Oil Company were made by separate instruments, and there is no statement, provision or indication in any of the instruments that a "pooling agreement" was intended or contemplated. Moreover, the various grants of mineral rights to the Good Pine Oil Company covered lands in several parishes and involved many separate and non-contiguous tracts. In the case of *Frost Lumber Industries* v. *Republic Products Co.*, 112 F. 2d 462 (C.C.A. 5, 1940), cert. den. 311 U. S. 676, the court said at p. 465:

> A grant of minerals creates as many separate servitudes as there are separate tracts of land involved; but as to each continuous and contiguous tract, regardless of its size, there exists but one servitude; and the exercise of its servitude upon any part of such tract preserves the servitude as to the whole tract.
>
> Under Louisiana law servitudes on non-contiguous tracts of land, although embraced in one instrument, are treated as separate and distinct servitudes and the development of the servitude on one tract is not the development of the servitude on the non contiguous tract.

The evidence summarized above can in no way be said to be a pooling or unitizing arrangement since the activities of one landowner cannot constitute a pooling agreement nor can the activities of the holders or owners of minerals or mineral rights without the consent of the landowner constitute

a pooling agreement. *Robinson* v. *Horton*, 197 La. 919; *Spears* v. *Nesbitt*, 197 La. 931; *Dobbins* v. *Hodges*, 208 La. 143; *Farrell* v. *Simms*, 209 La. 1072.

In the cases above cited, the situation was presented in which owners of land and the owners of mineral rights therein, as well as other parties, entered into formal written agreements unitizing or pooling their mineral interests by creating a joint lease to develop the property. The agreements involved in those cases provided for a division of royalties in proportion to the interest of each party, and, for the most part, provided that any well drilled on any part of the property was to be considered as having been drilled on the property covered by the written agreements. The court emphasized the point that the rights of the parties to the agreements were not governed by the law of servitudes and that the question of the contiguity or non-contiguity of the lands was immaterial in those cases where that issue was involved, and held that the rights of the parties were governed by the terms of their joint and indivisible contracts and that the parties were bound by their agreements. It is clear therefore that the evidence submitted by the defendant does not establish a unitizing or pooling of interests within the scope of these decisions. *Ohio Oil Co.* v. *Ferguson*, 213 La. 183.

For the reasons stated, a judgment should be entered declaring that the United States is the owner of the mineral rights to the lands described in the complaint and that the rights claimed by the Hobo Oil Company, Inc., have become prescribed and have been extinguished, and an injunction should be issued restraining the defendant from drilling on the lands involved in this case.

Respectfully submitted,

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(3)

Supreme Court, U.S.
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No. 04-190

In the Supreme Court of the United States

PETRO-HUNT, L.L.C., ET AL., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

1. Whether the United States is barred under the doctrine of res judicata from claiming title to mineral servitudes previously on federal property within the Kisatchie National Forest in Louisiana on the ground that those servitudes had prescribed (reverted to the landowner) due to non-use, because another mineral servitude owned by a predecessor company had been held imprescriptible in *United States* v. *Nebo Oil Co.*, 90 F. Supp. 73 (W.D. La. 1950), aff'd, 190 F.2d 1003 (5th Cir. 1951).

2. Whether the court of appeals erred in holding that collateral estoppel did not preclude the United States from litigating a choice-of-law issue in this case on the grounds that the issue was not actually litigated in *Nebo Oil* and, alternatively, that controlling legal principles were changed by *United States* v. *Little Lake Misere Land Co.*, 412 U.S. 580 (1973).

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In the Supreme Court of the United States

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-28a) is reported at 365 F.3d 385. The opinion of the district court (Pet. App. 61a-88a) is reported at 179 F. Supp. 2d 669.

JURISDICTION

The original judgment of the court of appeals was entered on March 31, 2004, and the revised judgment was entered on May 28, 2004. A petition for rehearing was denied on June 1, 2004 (Pet. App. 89a-91a). The petition for a writ of certiorari was filed on August 5, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners Petro-Hunt, L.L.C., et al., brought this quiet title action to obtain a declaration that they are the owners, in perpetuity, of mineral servitudes granting them mineral rights on approximately 180,000 acres of federal land within the Kisatchie National Forest in Louisiana. In asserting ownership of those servitudes, petitioners relied on Louisiana Act No. 315 of 1940 (Act 315), 1940 La. Acts 1249 (Pet. App. 98a-99a) (La. Rev. Stat. Ann. § 31:149 (West 2000)), which purported to render mineral servitudes on federal land exempt from the longstanding Louisiana rule of prescription for non-use; and on the judgment in *United States* v. *Nebo Oil Co.*, 90 F. Supp. 73 (W.D. La. 1950), aff'd, 190 F.2d 1003 (5th Cir. 1951), which, relying on Act 315, granted one of petitioners' predecessors title to mineral servitudes associated with 800 acres of land. The district court held that title to the disputed mineral servitudes was res judicata under *Nebo Oil*. The court of appeals reversed and remanded. Pet. App. 1a-28a.

1. Under Louisiana law, ownership of minerals on real property cannot be held as an estate separate from the land, but the right to enter the land and extract minerals can be held separately ~~in the~~ form of a mineral servitude. *Frost-Johnson Lumber Co.* v. *Salling's Heirs*, 91 So. 207, 243-245 (La. 1920); La. Rev. Stat. Ann. § 31:21 (West 2000). Under Louisiana law, rights of servitude ordinarily prescribe (*i.e.*, revert to the landowner) if not used for a period of ten years. *Frost-Johnson Lumber*, 91 So. at 243-245; La. Rev. Stat. Ann. § 31:27 (West 2000). The period of prescription for a servitude begins to run on the date the servitude is created, see *id.* § 31:28; *Ober* v. *Williams*, 35 So. 2d 219, 224 (La. 1948), and is interrupted only by "good faith

operations" for the "discovery and production of minerals" pursuant to that servitude. La. Rev. Stat. Ann. § 31:29 (West 2000).

2. Petitioners claim the mineral rights at issue in this case as successors in interest to the Nebo Oil Company (Nebo Oil), which was successor in interest to the Good Pine Oil Company (Good Pine Oil). Good Pine Oil was incorporated in 1932 as a joint venture of five Louisiana lumber companies (Good Pine Lumber, Trout Creek Lumber, Tall Timber Lumber, Bodcaw Lumber, and Grant Timber), which separately conveyed all mineral interests on their respective lands to Good Pine Oil to facilitate mineral exploration and production. Pet. App. 4a-5a. This case involves servitudes conveyed to Good Pine Oil through six separate grants by the Bodcaw Lumber Company and the Grant Timber Company. *Id.* at 5a. Because each of the six conveyances involved mineral rights on several parcels of land, many of which were noncontiguous, each conveyance created multiple servitudes. *Ibid.* Each of the six deeds conveying mineral rights to Good Pine Oil contained a clause contemplating that a ten-year prescriptive period would apply. *Id.* at 5a-6a.

Between November 1934 and January 1937, the United States acquired approximately 180,000 acres of land from Bodcaw Lumber and Grant Timber through nine purchases and two judgments of condemnation. Pet. App. 6a & n.15. The United States acquired the lands pursuant to the Act of March 1, 1911 (Weeks Law), ch. 186, 36 Stat. 961 (16 U.S.C. 480, 500, 515-519, 521, 552, 563), for the Kisatchie National Forest. The property acquired included portions of the land covered by the six mineral deeds between Bodcaw Lumber, Grant Timber, and Good Pine Oil. At the time of acquisition,

the land was burdened by 96 separate mineral servitudes in favor of Good Pine Oil (the Good Pine servitudes). Pet. App. 6a. Five of the 11 instruments of transfer (the nine purchases and two condemnations) contained additional mineral reservations in the name of Bodcaw Lumber or Grant Timber, which were to become effective upon the prescription of the servitudes held by Good Pine Oil. Pet. App. 6a-7a. Each of those five instruments stated that at the termination of the additional reservations, the United States would hold the land in "complete fee." *Id.* at 7a-8a.

3. In 1940, after all of the conveyances at issue in this case were completed, the Louisiana legislature enacted Act 315, which provided that when land acquired by the United States is subject to a mineral servitude, that servitude is "imprescriptible" for non-use. Act 315 § 1, 1940 La. Acts 1250. The stated purpose of the Act was to facilitate the United States' acquisition of land for national forests and parks and military installations, by permitting landowners to reserve mineral rights without the risk of losing those rights through prescription. See *United States* v. *Little Lake Misere Land Co.*, 412 U.S. 580, 599 & n.16 (1973). Act 315 also served Louisiana's interest in taxing and regulating minerals on federal land by preventing ownership of the minerals from reverting to the United States. See *id.* at 599-600. The Louisiana Supreme Court has held that Act 315 is "retrospective in its operation," and applies to mineral servitudes in existence at the time of its passage. *Leiter Minerals, Inc.* v. *California Co.*, 132 So. 2d 845, 854 (1961).

4. In 1948, the United States filed a declaratory judgment action against Nebo Oil to quiet title to a specific parcel of land, approximately 800 acres in size,

in which Nebo Oil claimed a mineral servitude as successor in interest to Good Pine Oil. Pet. App. 9a. This 800-acre parcel was one of several parcels totaling 24,943.93 acres acquired by the United States from Bodcaw Lumber through a 1936 deed and encompassed a portion of one of the 96 servitudes at issue in this case. *Id.* at 10a; Pet. 19 n.18. The United States claimed that no drilling had been conducted on that servitude during the ten-year prescriptive period, and therefore the servitude had prescribed for non-use. Nebo Oil admitted, however, that its lessees intended to drill on the property. Pet. App. 107a. The United States sought an order permanently enjoining Nebo Oil from entering the 800-acre parcel for mineral production. *Id.* at 10a.

The district court denied the United States relief, holding that the servitude on the 800-acre parcel retroactively had been rendered "imprescriptible" by Act 315. See *Nebo Oil*, 90 F. Supp. at 84. The court of appeals affirmed. The court held that Act 315's elimination of the rule of prescription for servitudes on federal land did not dispose of federal property in violation of the Property Clause, U.S. Const. Art. IV, § 3, Cl. 2, did not violate the Contract Clause, *id.* Art. I, § 10, Cl. 1, and did not violate the Due Process Clause of the Fourteenth Amendment, *id.* Amend. XIV, because the United States' "reversionary interest" in the minerals—*i.e.*, the interest in reclaiming minerals through prescription—was not a "vested" right under Louisiana law. *United States* v. *Nebo Oil Co.*, 190 F.2d 1003, 1008-1010 (5th Cir. 1951). In granting final judgment for Nebo Oil, the district court decreed that the "oil, gas, and sulphur in, on and under the lands described in the complaint are vested in perpetuity in Nebo Oil Company, Inc., its successors and assigns." Pet. App. 11a n.23.

5. In *United States* v. *Little Lake Misere Land Co.*, 412 U.S. 580 (1973), this Court invoked the choice-of-law doctrine outlined in *Clearfield Trust Co.* v. *United States*, 318 U.S. 363 (1943), to hold that Act 315 could not be applied retroactively to mineral reservations on lands acquired by the United States under the Migratory Bird Conservation Act, 16 U.S.C. 716 *et seq.* 412 U.S. at 602-603. In two transactions completed in the 1930s, the United States granted mineral reservations to the seller of the land, subject to a contractual provision that the servitude would "terminate" if not used for a ten-year period, and then "complete fee title to said lands [would] thereby become vested in the United States." *Id.* at 583 (citation omitted). The Court held that the court of appeals had erred by proceeding on the premise that state law governed the transaction. Because Act 315 would deprive the United States of "bargained-for-contractual interests" by abrogating the terms of the acquisition instruments relating to prescription, the Court held that Act 315 was "plainly hostile to the interests of the United States" and could not be "borrowed" as the rule of decision. *Id.* at 597. This Court held that the appropriate rule of decision instead was to be supplied by either federal common law or "residual" state law (*i.e.*, Louisiana state law without Act 315), both of which would give effect to the contract terms. *Id.* at 604.

In *Central Pines Land Co.* v. *United States*, 274 F.3d 881, cert. denied, 537 U.S. 822 (2001), the Fifth Circuit applied the reasoning of *Little Lake Misere* to existing mineral servitudes on property acquired by the United States under the Weeks Law for the Kisatchie National Forest. Although the court did not expressly overrule *Nebo Oil*'s constitutional analysis, the court rejected that

decision's premise that Louisiana Law (including Act 315) governed the transaction. The court held that Act 315 could not be borrowed as the rule of decision because, as in *Little Lake Misere*, it was hostile to the United States' interests in "obtaining the mineral rights via the default rule of prescription in place before Act 315." *Id.* at 891. The court held that the ten-year prescriptive period of "residual (pre-Act 315) Louisiana law" should govern the case, and concluded that the servitudes on the Kisatchie Forest lands had prescribed for non-use. *Id.* at 892.

6. In the early 1990s, in reliance upon *Little Lake Misere*, the United States began granting mineral leases on some Forest Service lands that had been burdened by Good Pine servitudes for which the period of prescription had run because of non-use. In February 2000, petitioners, who are successors in interest to Nebo Oil, brought suit in federal district court seeking a determination that they are owners in perpetuity of the 96 servitudes, that the mineral leases and lease offers issued by the United States were void, and seeking injunctive relief. Pet. App. 16a-17a. The government conceded that drilling operations had prevented prescription on several of the servitudes and that the servitude at issue in *Nebo Oil* was governed by the judgment in that case. But the government argued that the 95 mineral servitudes not at issue in *Nebo Oil* were subject to the ordinary rule of prescription for non-use and argued that ownership of several of the servitudes had reverted to the United States for non-use. *Id.* at 17a & n.49. Petitioners sought summary judgment, arguing that they were entitled to judgment as a matter of law because of *Nebo Oil* and that the doctrines of res judicata and collateral estoppel barred the United States

from contending that the servitudes had prescribed for non-use.

7. The district court granted summary judgment for petitioners on res judicata grounds. Pet. App. 57a-88a. The court held that *Nebo Oil* had applied Act 315 not just to the 800-acre parcel named in the complaint in that case, but to the entire "24,943.93 acre tract" sold to the United States by Bodcaw Lumber "of which the 800 acres was a part." The court concluded that the servitudes for "those minerals underlying the 24,943.93 acre tract were previously held imprescriptible and *res judicata* clearly applies." *Id.* at 87a. As for the ten land transfers not addressed in *Nebo Oil*, the district court concluded that "the entire 180,000 acres was similarly situated to the 800 acres at issue in *Nebo Oil*," that the government had a "full and fair opportunity" to "litigate the application and constitutionality of Louisiana Act 315 of 1940 to this mineral property," and that "[t]he government should not be allowed to litigate now that which it could have litigated 50 years ago." *Id.* at 87a-88a.

8. The court of appeals reversed. Pet. App. 1a-28a. The court first held that the judgment in *Nebo Oil* did not bar the United States under the doctrine of res judicata from claiming that servitudes (other than the one on the 800-acre parcel at issue in that case) had prescribed for non-use. Because there was no dispute about the sameness of the parties, the competency of the prior court, or the finality of the prior judgment, the court of appeals concluded that the dispositive issue was whether *Nebo Oil* and this case involved the "same claim." *Id.* at 20a. Turning to the "transactional test" of the Restatement (Second) of Judgments, see Restatement (Second) of Judgments § 24(1) (1982), the court determined that the "critical issue" was whether the two

actions were "based on the *same nucleus of operative facts.*" Pet. App. 21a (quoting *In re Southmark Corp.*, 163 F.3d 925, 934 (5th Cir.), cert. denied, 527 U.S. 1004 (1999)).

Because each of the Good Pine servitudes constituted a separate and "distinct real [property] right under Louisiana law," Pet. App. 23a, the court of appeals concluded that "the operative facts of the * * * actions would be distinct." *Ibid.* The court determined that the "most important[]" of the "operative facts" underlying the United States' claim in *Nebo Oil* was the "history of use or nonuse of that servitude," which determined the validity of the claim of prescription. *Id.* at 22a. The court noted that the "use histories of the other Good Pine servitudes were not operative facts of either the government's claim or Nebo Oil's defense to that claim." *Id.* at 23a-24a. The court explained that the district court's focus on "the factual similarities among the various servitudes and land acquisitions" reflected its confusion between res judicata (claim preclusion) and collateral estoppel (issue preclusion): while factual similarities were "potentially relevant for purposes of collateral estoppel, [they] are not relevant to *res judicata.*" *Id.* at 22a. Finally, the court pointed out that the government had brought the quiet title action in *Nebo Oil* because of a threat to begin drilling on the 800-acre parcel alone, and observed that neither the district court nor petitioners "have identified a principle of *res judicata* that requires an owner of separate properties to litigate title to all of those properties in response to a threat to his right of full use and enjoyment of only one of them." *Id.* at 23a.

Although the district court had not expressly addressed collateral estoppel, the court of appeals ad-

dressed whether that doctrine would "limit[]" "the United States's defense of this action." Pet. App. 24a. The court of appeals concluded that the United States was not barred by collateral estoppel from arguing that Act 315 did not govern the servitudes under the choice-of-law principles set forth in *Little Lake Misere* because the choice-of-law issue was not litigated in *Nebo Oil*. Rather, the court of appeals concluded, it had only "assumed the applicability of Act 315" in *Nebo Oil* and "did not address" the issue. *Id.* at 26a. The court of appeals held in the alternative that even if the United States had litigated the choice-of-law issue in *Nebo Oil*, the United States was not precluded from advocating a different choice-of-law conclusion here in light of the intervening rulings in *Little Lake Misere* and *Central Pines*, because "collateral estoppel applies to 'pure question[s] of law' only when there has been no 'change in controlling legal principles,' " *id.* at 24a-25a (quoting *Hicks* v. *Quaker Oats Co.*, 662 F.2d 1158, 1166-1167 (5th Cir. 1981)). The court remanded the case "so that the district court can determine which servitudes have in fact prescribed," *id.* at 28a, noting that the United States had "conceded that sufficient drilling operations had interrupted the running of prescription on some of the servitudes." *Id.* at 17a n.49.[1]

ARGUMENT

The court of appeals correctly applied settled principles of res judicata and collateral estoppel to the particular facts of this case. Its factbound decision does not

[1] After petitioners filed a petition for rehearing, the court of appeals amended its opinion to cite additional authority for the proposition that collateral estoppel applies to pure questions of law only when there has been no change in controlling legal principles. Compare Pet. App. 25a n.63, with *id.* at 53a n.63.

conflict with any decision of this Court or of any other court of appeals. Further review is not warranted, particularly in view of the interlocutory posture of the case.

1. Petitioners contend (Pet. 7-20) that the court of appeals erred in holding that this case and *Nebo Oil* involved different claims and therefore erred by concluding that res judicata did not control the outcome of this case. They contend that the court of appeals "has effectively held that *res judicata* only bars claims actually litigated," when in fact it "requires litigants to litigate all of their related claims at once." Pet. 11-12. Although petitioners concede (Pet. 19 n.17) that the rule of prescription would apply differently to each of the 96 servitudes at issue depending on the individual drilling history of each servitude, petitioners argue (Pet. 12-14) that because the servitudes were part of six similar mineral conveyances, the government was obliged to litigate title to *all* of the servitudes in 1948 when it brought a quiet title action concerning the single 800-acre tract on which drilling had been threatened. Petitioners assert (Pet. 7) that the court of appeals' decision has created a "split among the circuits," and will result in the "wasting [of] valuable judicial resources" by encouraging property owners to litigate claims "an acre at a time." Pet. 9. All of those contentions are without merit.

a. "Claim preclusion generally refers to the effect of a prior judgment in foreclosing successive litigation on the *very same* claim, whether or not relitigation of the claim raises the same issues as the earlier suit." *New Hampshire* v. *Maine*, 532 U.S. 742, 748 (2001) (emphasis added). In determining whether two suits involve the "same claim" for res judicata purposes, courts typically

employ the transactional test set forth in the Restatement (Second) of Judgments (1982). See *Nevada* v. *United States*, 463 U.S. 110, 131 n.12 (1983) (describing test); Pet. 12 n.11 (collecting authorities). Under that test, "the preclusive effect of a prior judgment extends to all rights the original plaintiff had 'with respect to all or any part of the transaction, or series of connected transactions, out of which the [original] action arose.'" Pet. App. 20a-21a (brackets in original) (quoting Restatement (Second) of Judgments § 24(1) (1982)). In applying that test, courts take a "pragmatic[]" approach, "giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage." Restatement (Second) of Judgments § 24(2) (1982). "[T]he critical issue is whether the two actions under consideration are based on the *same nucleus of operative facts*." Pet. App. 21a (quoting *In re Southmark Corp.*, 163 F.3d 925, 934 (5th Cir.), cert. denied, 527 U.S. 1004 (1999)). Petitioners do not dispute that the court employed the correct legal standard. Indeed, petitioners themselves advocate use of the Restatement's transactional test. See Pet. 12; accord Pet. C.A. Br. 22. Rather, petitioners simply contend that the court applied that inherently factbound test incorrectly to the circumstances of this case. Cf. generally *Sullivan* v. *Gagnier*, 225 F.3d 161, 166 (2d Cir. 2000) ("Any issue of preclusive effect depends on the specific facts and circumstances of each case."). That contention is without merit.

The court of appeals correctly determined (Pet. App. 22a) that the "most important[]" "operative facts" (*id.* at 21a) in *Nebo Oil* were the facts concerning the cre-

ation of the servitude on the 800-acre parcel in dispute and its subsequent use in drilling operations, and that those "operative facts" differed from the use histories for the remaining 95 mineral servitudes. Petitioners contend (Pet. 12-13) that that conclusion was erroneous because the six mineral conveyances and 11 land transactions implicated in this case involved common grantors and grantees, contained similar terms, and were made for similar purposes. But that argument fails to properly frame the issue in the context of the original litigation. *Nebo Oil* involved the stated intention of a predecessor corporation to drill on a specific 800-acre tract involving a servitude that the government claimed had prescribed for non-use. See Pet. App. 107a. Petitioners have cited no evidence that Nebo Oil then owned all of the Good Pine servitudes or had threatened to drill on other Good Pine servitudes that had prescribed. Indeed, at the time the government filed suit in that case, the largest of the Good Pine servitudes (covering more than 157,000 of the approximately 180,000 acres in question) were still in use and had not prescribed. Gov't C.A. R.E. 8, at 1-9. The United States therefore had no basis for suing to quiet title on the majority of the servitudes on the 180,000 acres, which were still in use for mineral production; nor did it have any reason to seek to quiet title to the lands not then in use (because there was no threat to use the land).[2] The court of appeals therefore correctly concluded that this case involves different "claims" than *Nebo Oil*. In any event,

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[2] Far from promoting efficiency, as petitioners claim, the novel rule advocated by petitioners would itself "wast[e] valuable judicial resources" (Pet. 9) by requiring landowners preemptively to litigate title to tens of thousands of acres of property over which there is no current dispute.

the court of appeals' inherently factbound application of the Restatement test, which necessarily must "be applied with attention to the facts of [particular] cases," Restatement (Second) of Judgments § 24, cmt. b at 199 (1982), does not warrant further review. See generally *Nevada*, 463 U.S. at 131 n.12 (noting that transactional test is "not capable of a mathematically precise" application) (quoting Restatement (Second) of Judgments § 24, cmt. b, at 199 (1982)).

b. Petitioners err in contending (Pet. 7) that the court of appeals decision is an "extreme departure" from existing case law and a "rogue opinion" that warrants the exercise of this Court's supervisory power. Pet. 8. While petitioners assert (Pet. 18) that the government's emphasis on the separateness of the servitudes in this case is a "red herring," there is no dispute that the United States acquired its property interests from two different lumber companies in 11 separate transactions that each involved multiple parcels of land burdened by distinct servitudes. Petitioners do not adequately explain how a disparate group of properties with different use histories could be "a convenient unit for the purposes of trial" (Pet. 12 (quoting Restatement (Second) of Judgments § 24, cmt. b at 199 (1982))), such that they must be treated as the "same claim" for res judicata purposes.[3]

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[3] Petitioners repeatedly invoke (Pet. 3, 9, 10) an opinion given in 1935 to Bodcaw Lumber Company by an Assistant Solicitor at the Department of Agriculture "to the effect that the prescriptive provisions of the Louisiana Civil Code would not apply to lands sold to the United States for national forest purposes." *Nebo Oil*, 190 F.2d at 1005. Petitioners cannot claim detrimental reliance on that letter because petitioners are successors in interest to *Good Pine Oil*, not Bodcaw Lumber, and Good Pine Oil acquired its servitudes before the representations in the letter were made. In addition, the letter was supplied to Bodcaw Lumber

Moreover, as noted by the court of appeals (Pet. App. 23a), petitioners have identified no authority for the proposition that the owner of separate parcels of land "must litigate title to all of those properties in response to a threat to his right to full use and enjoyment of only one of them." In fact, the law is to the contrary. Although the preclusive effect of *Nebo Oil* is a matter of federal res judicata law, cf. *Semtek Int'l Inc.* v. *Lockheed Martin Corp.*, 531 U.S. 497, 508 (2001), the long practice in Louisiana land-title cases may inform that determination. Cf. *ibid.* (advocating "adopt[ion], as the federally prescribed rule of decision, the law that would be applied by state courts in the State in which the federal diversity court sits"). It has long been the law in Louisiana that "separate tract[s] of land held under * * * separate title * * * may be separately litigated." *Board of Comm'rs* v. *Cockrell*, 91 F.2d 412, 417 (5th Cir.), cert. denied, 302 U.S. 740 (1937); accord *Lieber* v. *Ownership of Real Prop. Located in Caddo Parrish*, 501 So. 2d 957, 959 (La. Ct. App. 1987) ("The lands that were not included in the prior suit do not fit the requirement that the object be the same. * * * A cause of action is not split when the same parties bring two separate actions to

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after the three largest transactions at issue in this case (totaling over 130,000 acres) were completed, Gov't C.A. Br. 11-12, and several of the transfer instruments at issue in this case explicitly provided that at the end of all reservation periods, the United States would own the land "in complete fee." Pet. App. 7a-8a; *id.* at 118a. Even if the letter were relevant here, its existence would counsel *against* application of res judicata because the letter is an "operative fact" only for *some* parcels of land at issue in this case. Bodcaw Lumber alone sold the United States the 800 acres at issue in *Nebo Oil*. See 90 F. Supp. at 78. However, Bodcaw was one of two companies that sold the United States the land at issue in this case, and one of *six* companies that contributed property to Good Pine Oil.

determine the ownership of two separate tracts of land."); *State* v. *American Sugar Refin. Co.*, 32 So. 965, 965 (La. 1902) ("The plea of res adjudicata is without force, unless the object demanded in the former suit was *precisely the same* as that demanded in the action pending.") (emphasis added). The court of appeals' decision is fully in accord with that rule.

The land title cases that petitioners claim are "similar" to this case (Pet. 14-16) are inapposite. None stands for the proposition that a landowner must bring all claims relating to "similarly situated" parcels of land at the same time to avoid arguments that later suits are precluded. The cases cited by petitioners either apply the doctrine of collateral estoppel (issue preclusion) rather than the distinct doctrine of res judicata (claim preclusion), or involve litigation over the *same* tract of land rather than distinct (but similarly situated) parcels of property, or both.[4] Indeed, *Moore* v. *Swayne-Hunter*

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[4] *Southern Pacific Railroad* v. *United States*, 168 U.S. 1 (1897), involved collateral estoppel, rather than res judicata, see *id.* at 48-49, as petitioners concede (Pet. 14 n.14). There, the Court held only that when a particular factual issue relating to title (there, the accuracy of a map showing legal boundaries of property) has been litigated between two parties in one action, the losing party may not reopen that issue when it arises in a subsequent suit between the same parties. *Id.* at 48-49. *Moore* v. *Swayne-Hunter Farms, Inc.*, 841 S.W.2d 308, 313 (Mo. Ct. App. 1992), explicitly states that it "involves application of the principles of collateral estoppel rather than * * * res judicata"; in any event, it held only that when parties had previously litigated ownership of a portion of a single tract of land, the judgment was binding on the parties for the remaining portion of *the very same tract of land*, not for "similarly situated" (Pet. 15) tracts. *Peasley* v. *State*, 424 N.Y.S.2d 995 (Ct. Cl. 1980), involved collateral estoppel rather than res judicata. *Id.* at 1000-1001. Furthermore, the two suits at issue there did not involve separate parcels of land; rather, the first suit determined that "the State had no title to *any portion* of the land," *id.* at 998 (emphasis

Farms, Inc., 841 S.W.2d 308 (Mo. Ct. App. 1992), cited by petitioners (Pet. 15), *directly refutes* petitioners' argument: the court there clearly indicated that "[b]ecause the present action involve[d] the 150 acres not [at issue] in the [earlier] condemnation action," the doctrine of res judicata did not apply; any preclusive effect would stem from application of the distinct doctrine of collateral estoppel. *Id.* at 313.

c. Petitioners assert (Pet. 7) that the decision of the court of appeals in this case has "unsettled" the law of res judicata and created a circuit split. While petitioners cite, without explanation, decisions of five other courts of appeals, they do not identify any conflict between the standards applied in those cases and that applied by the court of appeals in this case. Because each of the cited cases applied the Restatement's transactional test (or a comparable test) to legal claims that are very different

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added), including the portion that was the subject of the second suit. While *Nevada* v. *United States*, 463 U.S. 110 (1983), involved res judicata, it did not involve its application to prevent a party from litigating ownership rights to property distinct from that at issue in the first case; that case involved litigation over *the very same* property rights at issue in the first case (water rights in the Truckee River). *Id.* at 132. While *Nevada* emphasized the importance of the doctrine of res judicata in disputes involving real property, nothing in the Court's decision undermines the principle that claim preclusion is limited to the operative facts" of the initial proceeding. The most relevant of the cases petitioners cite is *Custer* v. *Hall*, 76 S.E. 183 (W. Va. 1912), which involved application of res judicata to two parcels of the same single tract of land that were the subject of an exceedingly complex intra-family dispute. *Custer* (like *Moore*, discussed in the text) involved res judicata under *state* law, however, and there was no indication in *Custer* that there were any differences between the parcels that could have affected title (as is the case with the different mineral-use histories on the servitudes here).

from those at issue here, they cannot be said to conflict with the court of appeals' decision in this case.[5]

d. Finally, petitioners err in contending (Pet. 11) that the court of appeals "confused" collateral estoppel and res judicata and "effectively held that *res judicata* only bars claims actually litigated." The court of appeals made clear that res judicata applies to all "grounds" or "defenses" "available to the parties" on the nucleus of operative facts constituting the claim at issue, "regardless of whether they were asserted or determined in the prior proceeding." Pet. App. 20a n.52 (quoting *Brown* v. *Felsen*, 442 U.S. 127, 131 (1979)). But the fact that res judicata applies to all arguments that could have been made regarding a "common nucleus of operative facts" does not mean, as petitioners suggest (Pet. 12-13, 16-18), that res judicata applies to all distinct "claims" (as factual groupings) that could have been joined in

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[5] See *Havercombe* v. *Department of Educ.*, 250 F.3d 1, 4-5 (1st Cir. 2001) (applying Restatement transactional test to employment-discrimination claims); *Ragsdale* v. *Rubbermaid, Inc.*, 193 F.3d 1235, 1239 n.8 (11th Cir. 1999) (applying Restatement transactional test to False Claims Act claims); *Sure-Snap Corp.* v. *State St. Bank & Trust Co.*, 948 F.2d 869, 874 (2d Cir. 1991) (citing Restatement transactional test in resolving lender-liability claim); see also *In re Colonial Mortgage Bankers Corp.*, 324 F.3d 12, 17 (1st Cir. 2003) (in dispute involving right to funds in bank account, finding claims to be the same where the "substance" of the causes of action was "materially identical"); *Tahoe-Sierra Pres. Council, Inc.* v. *Tahoe Reg'l Planning Agency*, 322 F.3d 1064, 1078 (9th Cir. 2003) (holding that judgment in prior challenge to regulatory plan was res judicata because an "[i]dentity of claims exists when two suits arise from 'the same transactional nucleus of facts'"); *Bethesda Lutheran Homes & Servs., Inc.* v. *Born*, 238 F.3d 853, 857 (7th Cir. 2001) (stating that "for purposes of res judicata a claim is not an argument or a ground but the events claimed to give rise to a right to a legal remedy," in discussing claim of improper denial of Medicaid benefits).

common litigation. To the contrary, the courts of appeals have recognized that the doctrine of res judicata is not as broad as rules governing permissive joinder. See *Rosemann* v. *Roto-Die*, 276 F.3d 393, 398 (8th Cir. 2002); *Dore* v. *Kleppe*, 522 F.2d 1369, 1374-1375 (5th Cir. 1975).

2. Petitioners also contend (Pet. 20-29) that the court of appeals erred by holding that collateral estoppel does not bar the United States from contending that Act 315 does not govern the servitudes at issue in this case under the holdings of *United States* v. *Little Lake Misere Land Co.*, 412 U.S. 580 (1973), and *Central Pines Land Co.* v. *United States*, 274 F.3d 881 (5th Cir.), cert. denied, 537 U.S. 822 (2001). Specifically, they argue that the court of appeals erred in concluding that the threshold choice-of-law issue was not actually litigated during the *Nebo Oil* litigation. Pet. 26-28. Petitioners also argue (Pet. 20-26, 28-29) that the court of appeals erred by concluding, in a brief three-sentence alternative holding, that "even if the choice-of-law issue had been raised in *Nebo Oil*, changes in controlling legal principles prevent the United States from being precluded from litigating the issue in this case." Pet. App. 27a-28a. They contend that the Fifth Circuit has "substantially expanded" (Pet. 20) the change-of-law exception to collateral estoppel and thereby created a "[s]plit in the [c]ircuits." Pet. 24. Those arguments are without merit. Further review is not warranted, particularly because petitioners will not benefit unless the Court finds the court of appeals erred with respect to both of its alternative holdings.

a. It is well established that the doctrine of collateral estoppel applies only to matters "actually litigated." *Nevada*, 463 U.S. at 130 n.11 (citing *Parklane Hosiery*

Co. v. *Shore*, 439 U.S. 322, 326 n.5 (1979)); accord *Southern Pac. R.R.* v. *United States*, 168 U.S. 1, 48 (1897) (estoppel applies to a "right, question, or fact distinctly put in issue and directly determined"). Petitioners do not dispute that principle. They contend only that the court of appeals erred in its application of the principle to the particular facts of this case. Petitioners do not explain why this Court is better situated than the Fifth Circuit itself is to decide the fundamentally factbound question of which issues that court (and the district court) decided in *Nebo Oil*. See generally *Purdy* v. *Zeldes*, 337 F.3d 253, 260 n.7 (2d Cir. 2003) (stating that "[c]ollateral estoppel * * * is a fact intensive inquiry that is best determined on a case-by-case basis").

The court of appeals correctly determined that the choice-of-law issue was not litigated in *Nebo Oil*. The district court in *Nebo Oil* addressed three constitutional issues concerning the application of Act 315: (1) whether application of Act 315 to the 800-acre tract at issue would interfere with the United States' rights, under Article IV, Section 3, Clause 2 of the Constitution, to use and regulate property; see 90 F. Supp. at 84-88; (2) whether it would impair the obligation of contracts in violation of Article 1, Section 10 of the Constitution, see 90 F. Supp. at 88-95; and (3) whether it would violate the Due Process or Equal Protection Clauses of the Fourteenth Amendment. See 90 F. Supp. at 95-100. The court of appeals in *Nebo Oil* addressed the same three issues. See 190 F.2d at 1008. The government's court of appeals brief in *Nebo Oil* listed five questions presented by the case, Pet. App. 119a-120a, and none of them involved choice of law.

Contrary to petitioners' suggestion (Pet. 27), the fact that the *Nebo Oil* courts applied state law does not mean that the courts "of necessity" recognized the choice-of-law issue and decided it. Rather, as the court of appeals concluded, the courts and the parties in *Nebo Oil* simply "assumed the applicability of Act 315," Pet. App. 26a, without ever addressing the choice-of-law issue. In *Little Lake Misere*, this Court held that it was error to assume the applicability of Act 315 to the federal acquisition of land in Louisiana, see 412 U.S. at 590-591 & n.8, and that the courts should instead perform a choice-of-law analysis under *Clearfield Trust Co.* v. *United States*, 318 U.S. 363 (1943). See 412 U.S. at 590-592. Thereafter, in *Central Pines*—in which the court of appeals applied *Little Lake Misere* to hold that Act 315 could not be applied to pre-existing mineral servitudes, like those at issue in this case, on land acquired under the Weeks Law for national forests, see 274 F.3d at 891-892—the court of appeals stated that it did not need to decide whether *Little Lake Misere* overruled *Nebo Oil*, because *Nebo Oil* did not address the choice-of-law question. See *id.* at 889-890.

Petitioners err in contending (Pet. 27-28) that the district court in *Nebo Oil* actually did address the choice-of-law issue. The quotations from the district court opinion cited by petitioners (*ibid.*) are from a section of the opinion discussing the Property Clause of the Constitution, not choice of law. There, the district court cited cases discussing state laws regulating property in concluding that state laws that affected federal property would not violate the Property Clause if they did not "interfere with the purposes for which the United States purchased the land in question." *Nebo Oil*, 90 F. Supp. at 85; see also *id.* at 88. Petitioners' assertion (Pet. 28)

that the United States made a "choice-of-law" argument in its *Nebo Oil* brief and that the brief "even has a reference to the *Clearfield Trust* decision" (*ibid.*) is equally mistaken. The cited portion of the brief (Pet. App. 127a-128a) concerns the government's argument that Act 315 violated the Property Clause, and the citation to *Clearfield Trust* is embedded in a string citation within a lengthy block quotation from a decision of this Court concerning intergovernmental tax immunity. Pet. App. 127a-128a (quoting *United States* v. *County of Allegheny*, 322 U.S. 174, 182-183 (1944)).

b. Petitioners are likewise mistaken in contending (Pet. 20-26, 28-29) that the court of appeals misapplied the change-of-law exception to the collateral estoppel doctrine when it held that, even if the choice-of-law issue had been "actually litigated" in *Nebo Oil*, "changes in the controlling legal principles prevent the United States from being precluded from litigating the issue in this case." Pet. 27a-28a. It is hornbook law that collateral estoppel does not preclude relitigation of a legal issue previously decided between parties when there has been "an intervening change in the legal climate," "[e]ven when claims in two actions are closely related." Restatement (Second) of Judgments § 28, cmt. c (1982) at 276; *id.* § 28 and 28(2) at 273 ("relitigation of the issue in a subsequent action between the parties is not precluded" when "[t]he issue is one of law and * * * a new determination is warranted in order to take account of an intervening change in the applicable legal context"); 18 Charles A. Wright et al., *Federal Practice and Procedure* § 4426, at 686 & n.5 (2d ed. 2002); see also *Limbach* v. *Hooven & Allison Co.*, 466 U.S. 353, 362 (1984) (declining to apply "the collateral-estoppel doctrine in the present case" because prior case was based

on analysis "*repudiated* by this Court's intervening pronouncement"); *Montana* v. *United States*, 440 U.S. 147, 161 (1979) (quoting *Commissioner* v. *Sunnen*, 333 U.S. 591, 599 (1948)).

The court of appeals' alternative holding correctly applied that basic principle. Assuming, *arguendo*, that the choice-of-law issue was "actually litigated" in *Nebo Oil* and, accordingly, that *Nebo Oil* is to be read as holding that Act 315 can be retroactively applied against the United States under choice-of-law principles, that holding has been overruled. *Little Lake Misere* held that Act 315 could not be applied retroactively to mineral reservations granted by the United States on lands acquired under the Migratory Bird Conservation Act. 412 U.S. at 602-603. In *Central Pines*, the Fifth Circuit applied the reasoning of *Little Lake Misere* to hold that Act 315 could not be applied retroactively to existing mineral servitudes on land that, like the property involved in this case, the United States acquired in the 1930s under the Weeks Law for the Kisatchie National Forest.[6] 274 F.3d at 891. *Central Pines* "rejected the presumption in *Nebo Oil* that Louisiana law governed the terms of the transactions at issue." Pet. App. 15a. Thus, the court of appeals correctly concluded that "changes in the controlling legal principles prevent the United States from being precluded from litigating the issue in this case." *Id.* at 27a-28a. See, *e.g.*, *Monahan* v. *New York City Dep't of Corr.*, 214 F.3d 275, 290 (2d Cir.), cert. denied, 531 U.S. 1035 (2000); *Spradling* v. *City of*

[6] Petitioners' suggestion (Pet. 21) that *Little Lake Misere* expressly distinguished *Nebo Oil* on its facts is mistaken. The Court noted the facts of *Nebo Oil* in the factual section of the opinion, see 412 U.S. at 586, and only noted without comment the observations of the court of appeals in that case. *Id.* at 586 & n.4.

Tulsa, 198 F.3d 1219, 1222 (10th Cir. 2000). The Restatement emphasizes that reexamination is particularly appropriate where, as here, "one of the parties is a government agency responsible for continuing administration of a body of law" and applying collateral estoppel would "give one [party] a favored position in current administration of a law." Restatement (Second) of Judgments § 28, cmt. c at 278 (1982). If the change-of-law exception were not applied here, petitioners would be placed at an unfair advantage (see *id.* at 276) vis-a-vis other servitude holders on federal land, for whom the rule of prescription undeniably applies.[7] See *Central Pines, supra.* Cf. generally *Limbach*, 466 U.S. at 363 (refusing to apply collateral estoppel where doing so would put litigant in a favored position "based upon a now repudiated legal doctrine," while competitors would have liability "determined upon the basis of the fundamentally different approach adopted" in intervening decision).

Petitioners contend (Pet. 22-26) that the court of appeals' decision in this case conflicts with *United States* v. *Stauffer Chemical Co.*, 464 U.S. 165 (1984), and the decisions of other courts of appeals. That argument confuses two distinct collateral estoppel exceptions.

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[7] Petitioners' claim (Pet. 22) that "a party who has lost in federal civil litigation cannot relitigate the very same case years later just because the underlying constitutional provision * * * has 'evolved,'" concerns res judicata (claim preclusion), not issue preclusion. For the reasons set forth above, see pp. 11-19, *supra*, petitioners' res judicata claim is without merit. The authorities cited by petitioners (Pet. 22) are inapposite. See 18 Charles A. Wright et al., *supra*, § 4415, at 369-370 (discussing claim preclusion); *Tomlin* v. *McDaniel*, 865 F.2d 209 (9th Cir. 1988) (discussing motions for relief from judgment under Fed. R. Civ. P. 60); *United States* v. *Real Prop. Described as 3947 Locke Ave.*, 164 F.R.D. 496 (C.D. Cal. 1995) (same).

The Restatement (Second) of Judgments provides that parties are not precluded from relitigating an "issue of law" previously decided between them when *either* "(a) the two actions involve claims that are substantially unrelated, *or* (b) a new determination is warranted to take account of an intervening change in the applicable legal context." Restatement (Second) of Judgments § 28(2) (1982) (emphasis added). See generally *Burlington N. R.R.* v. *Hyundi Merch. Marine Co.*, 63 F.3d 1227, 1229 (3d Cir. 1995) (noting distinction). The exception for "substantially unrelated" actions reflects a concern for development of the law and is based on the notion that "[a] rule of law declared in an action between two parties should not be binding on them for all time * * * when other litigants are free to urge that the rule should be rejected." See Restatement (Second) of Judgments § 28(2), cmt. b, at 275-276 (1982). The change-of-law exception reflects a concern for the equitable administration of the law after legal principles have already changed. *Id.* § 28(2), cmt. c.

As the court of appeals correctly concluded (Pet. App. 28a n.73), in *Stauffer*, "there had been no change in controlling legal principles between the first and the second action," and that decision instead discussed the distinct exception to collateral estoppel for "'unmixed questions of law' arising in 'successive actions involving unrelated subject matter.'" *Ibid.* (quoting *Stauffer*, 464 U.S. at 170, and *Montana*, 440 U.S. at 162); see also *Stauffer*, 464 U.S. at 170 ("The Government does not argue * * * that controlling law or facts have changed."); *Burlington N.*, 63 F.3d at 1238 (noting that there had been no "intervening change in the applicable legal context"). Unlike *Stauffer* and *Burlington Northern*, this case involves both an issue of law and a change in

the controlling legal principle, and the government has not invoked the distinct exception to collateral estoppel principles addressed in those cases. See Pet. App. 27a n.73. Consequently, there is no requirement that the present case be "substantially unrelated" to *Nebo Oil* for the change-of-law exception to apply. See Restatement (Second) of Judgments § 28, cmt. c, at 276 (1982) (change-of-law exception applies "[e]ven when claims in two actions are closely related").

Nor does the court of appeals' decision conflict with *O'Leary* v. *Liberty Mutual Insurance Co.*, 923 F.2d 1062 (3d Cir. 1991). In that case, the Third Circuit held that the exception for changes in law did "not permit a party to relitigate an issue * * * arising out of the same transaction or set of operative facts—e.g., the same automobile accident—that formed the basis of the first action." *Id.* at 1069. That statement simply acknowledged that the change-of-law exception to the doctrine of collateral estoppel (issue preclusion) cannot be used as a basis for relitigating issues that would be barred by res judicata (claim preclusion). See *Federated Dep't Stores* v. *Moitie*, 452 U.S. 394, 398 (1981) (stating that "the res judicata consequences of a final, unappealed judgment" are not "altered by the fact that the judgment * * * rested on a legal principle subsequently overruled in another case"'). The *O'Leary* court expressly noted a party's right to relitigate a legal issue, based on changes in the law, "in an action arising out of a new incident." *Ibid.* That is precisely the rule the court of appeals applied here. The other cases cited by petitioners are inapposite.[8]

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[8] See *Steen* v. *John Hancock Mut. Ins. Co.*, 106 F.3d 904, 914-915 (9th Cir. 1997) (declining to apply change-of-law exception to a "factual conclusion" made in earlier decision where parties had not shown that

3. Petitioners assert (Pet. 30) that the government "has not paid" for the mineral interests at issue in this case, and that judgment for the government would be tantamount to a taking of property without just compensation, in violation of the Fifth Amendment. Petitioners did not raise that issue before the court of appeals, see Pet. C.A. Br. 1-51, and therefore it "is not properly before" this Court. *Delta Airlines, Inc.* v. *August*, 450 U.S. 346, 362 (1981). Nor have petitioners even listed that among the questions presented by their petition. But see Sup. Ct. R. 14.1(a). In any event, that claim is meritless.

While the district court in *Nebo Oil* found that the United States did not seek to acquire and did not specifically pay for mineral rights when acquiring the 24,943.93 acres of land that included the 800-acre parcel at issue in *Nebo Oil*, that does not necessarily mean the same is true of the other ten land transactions (eight deeds of sale and two judgments in condemnation) at issue in this case that were not discussed in *Nebo Oil*. In any event, petitioners are mistaken in suggesting (Pet. 30) that because the government did not purchase the land *specifically to obtain the mineral rights*, it had no

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the intervening decision "constituted a change in the law"); *North Ga. Elec. Membership Corp.* v. *City of Calhoun*, 989 F.2d 429, 436 (11th Cir. 1993) (declining to apply exception where "[t]here has been no intervening change in the law"); *Precision Air Parts, Inc.* v. *AVCO Corp.*, 736 F.2d 1449, 1504 (11th Cir. 1984) (declining to apply change-of-law exception under doctrine of res judicata when change in law was not "moment[o]us"), cert. denied, 469 U.S. 1191 (1985). *Beverly Health & Rehab. Servs., Inc.* v. *NLRB*, 317 F.3d 316, 323 n.2 (D.C. Cir. 2003), did not address the change-of-law exception, but rather discussed the distinct exception for "unmixed questions of law arising in successive actions involving unrelated subject matter" that was at issue in *Stauffer* and *Burlington Northern*.

expectation of obtaining residual mineral interests through prescription. The government purchased the land (and petitioners' predecessors separately acquired their mineral interests) before enactment of Act 315 and against a background rule that mineral servitudes would revert to the property owner if not used for a period of ten years. Thus, at the time petitioners' predecessors acquired their mineral servitudes, there was no doubt that the servitudes were subject to prescription. Likewise, at the time the United States acquired the land subject to those servitudes, there was no basis in Louisiana law for asserting that the government's acquisition altered the nature of the servitudes or the rights of the servitude holders who were not parties to the transactions. Moreover, several of the instruments transferring the land to the United States explicitly recognized that the servitudes were subject to prescription, stating that at the end of a specified reservation period, "the United States would hold the land in 'complete fee.'" Pet. App. 7a-8a. Because the rule of prescription and the attendant right of reversion were implicit in all of the transactions at issue in this case, judicial recognition of that fact neither enlarges the government's property interests nor diminishes petitioners' property interests.[9]

4. Finally, this Court ordinarily does not review interlocutory decisions of the sort at issue here. *Brotherhood of Locomotive Firemen* v. *Bangor &*

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[9] Petitioners are likewise mistaken in their view (Pet. 30) that *Nebo Oil* made a "determination" with respect to the entire 180,000 acres of land at issue here. As the court of appeals noted in this case, the district court's final decree in *Nebo Oil* specifically limited the scope of its determination to "the lands *described in the complaint*," Pet. App. 11a n.23 (quoting final decree), *i.e.*, the 800-acre tract specifically delimited in the complaint. See *id.* at 101a (complaint).

Aroostock R.R., 389 U.S. 327, 328 (1967) (per curiam); *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., respecting denial of certiorari); see generally Robert L. Stern et al., *Supreme Court Practice* § 4.18, at 258 (8th ed. 2002). The court of appeals did not render final judgment on the merits of petitioners' suit, which remains pending in district court, but simply held that petitioners are not entitled to summary judgment on grounds of res judicata or collateral estoppel. Contrary to petitioners' claim (Pet. 6) that the court of appeals "seemed to rule for the government on the title issue," the court explicitly left open the issue of legal title and remanded the case "so that the district court can determine which servitudes have in fact prescribed," Pet. App. 28a, noting that the United States had "conceded that sufficient drilling operations had interrupted the running of prescription on some of the servitudes." *Id.* at 17a n.49. Petitioners may yet obtain a declaration that they continue to possess some of the mineral servitudes at issue, and in any event, they will be able to seek review of any final judgment entered by the district court. The lack of finality of the judgment below is "of itself alone" a "sufficient ground for the denial of the [writ]." *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 04-190

IN THE

Supreme Court of the United States

PETRO-HUNT, L.L.C., *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF

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CORPORATE DISCLOSURE STATEMENT

Petitioners' corporate disclosure statement was set forth at page *iii* of the Petition for a Writ of Certiorari, and there are no amendments to that statement.

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18 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure*, § 4425 (2002) 8

Petitioners, Petro-Hunt, L.L.C., Hunt Petroleum Corporation and Kingfisher Resources, Inc. (hereinafter "petitioners"), reply to the Brief of the United States in Opposition as follows.

This case is about *res judicata*. It is not about the relative merits of the result obtained in *United States v. Nebo Oil Company*, 90 F. Supp. 73 (W.D. La. 1950), *aff'd*, 190 F.2d 1003 (5th Cir. 1951), *vis a vis* the later decision of this court in *United States v. Little Lake Misere Land Co.*, 412 U.S. 580 (1973), and the Fifth Circuit's decision in *Cent. Pines Land Co. v. United States*, 274 F.3d 881 (5th Cir. 2001), *cert. denied*, 537 U.S. 822 (2002). These later cases are inapposite to a determination of the scope and breadth, and finality, of the *Nebo* judgment.

The government apparently wants to "retry" *Nebo* using these later decisions as precedent, and makes a considerable effort to draw attention away from the core issues of this case. For example, the fact that there are 96 servitudes does not have anything to do with application of La. Act. 315 of 1940, and the *Nebo* decision. The 96 servitudes, and any facts relating to drilling on those servitudes, are only pertinent to the issue of prescription of non-use, in the absence of Act 315, and were the subject of petitioners' alternative summary judgment motion. The alternative motion was held moot by the District Court, as a result of the court's ruling on petitioners' motion based on *res judicata*.

Court rules do not allow enough space for petitioners to respond to each allegation made by the government.[1] Instead,

1. For example, the government alleges that petitioners have supplied no proof of ownership to all of the Good Pine Minerals. (Br. in Opp. 13) The chain of title evidence is in the record (R. Doc. 85), and the District Court found that the "United States [did] not dispute that the current plaintiffs . . . are successors in interest to the mineral servitudes that had been previously owned by Good Pine Oil and later Nebo Oil Company." (Pet. App. 70a-71a)

petitioners will endeavor to discuss, and debunk, some of the government's more aggressive, but untenable, arguments.

In *United States v. Nebo Oil Co.*, *supra*, the court found that the government had represented to Nebo's predecessor in title that the minerals would not be subject to the prescriptive rules if the government bought the surface. Louisiana Act 315 of 1940 merely codified the representations made by the government in inducing the petitioners' predecessors in interest to sell their property; representations, which, in fact, enabled Louisiana landowners to be on equal footing with landowners in the rest of the country. The government also wishes to ignore the finding by the *Nebo* court that the government had adopted a policy of not buying minerals for Weeks Act purposes, had no intent to buy the minerals, and further, did not pay for the minerals. *Nebo*, 90 F. Supp. 87.

The government further asserts that petitioners are not entitled to rely on the government's 1935 title opinion, which stated that the minerals would not prescribe if the surface was sold to the government because that opinion was given to Bodcaw Lumber rather than Good Pine. (Br. in Opp. 14 n.3) The owners of Bodcaw and Grant were owners of an interest in Good Pine. Having placed their mineral holdings in Good Pine, Grant and Bodcaw wanted assurance that the minerals would not prescribe if the surface was sold to the government. *Nebo*, 90 F. Supp. at 79. Moreover, *Nebo* reflects that the notion the minerals would not prescribe, if the surface was sold to the government, had received broad support among the National Forest Reservation Commission members and its attorneys, and very likely predated 1935.[2]

2. "Mr. Florence stated that the question [of prescription] came up about 1935 or perhaps a year or so earlier when national forest purchases *first began in Louisiana*." *Nebo*, 90 F. Supp. 91 (emphasis added.) Grant and Bodcaw first sold surface acreage to the government in 1932. Further, more than 400 oil and gas wells have been drilled on this 180,000 acres, many of which were drilled before 1950.

The District Court in this case concluded that *Nebo* applied to the 24,943.93 acre conveyance from Bodcaw to the United States of which the disputed 800 acres was a part. Although the government concedes that there are "factual similarities among the various servitudes and land acquisitions," (Br. in Opp. 9) the double-speak that the government engages in to dismiss these obvious similarities defies reason. The government fails to show any reason why the 800 acres were not part of the same transaction or series of transactions as the larger conveyance which contained this acreage. Further, the government provides no rational explanation for why factual similarities are "potentially relevant for purposes of collateral estoppel, [but] are not relevant to *res judicata*." (Br. in Opp. 9)

In response to petitioners' assertion that the Fifth Circuit has restricted the scope of *res judicata*, the government contends that the petitioners wish to broaden the rules of *res judicata*. (Br. in Opp. 19) In fact, petitioners merely assert *res judicata* should apply to this case because this case arises out of the same nucleus of operative facts as *Nebo Oil*. The mineral property at issue here is comprised of six identical conveyances, made by the same group of grantors to the same grantee for a common purpose within a relatively short period of time. Where, as here, each conveyance is virtually the same and clearly part of a series of connected transactions, entered into by the same parties, each transaction a continuation of the previous transactions; then all of the transactions are based upon the same nucleus of operative facts. *See, e.g.* Restatement (Second) of Judgments § 24 cmt. (b) (1982). The District Court found, based upon undisputed facts, that the acreage that is the subject of this lawsuit was all "similarly situated." (Pet. App. 87a)

The government also alleges that it could not have asserted its additional claims to the rest of the mineral property at the time of the original *Nebo Oil* suit, because of

drilling or production on the property. However, as found by the District Court, "[t]here was no reason for the United States to wait ten years to litigate title to property whose owners claimed it would never prescribe." (Pet. App. 74a-75a)

Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497 (2001), cited by the government, speaks to the effect state courts must give to federal court judgments and is inapposite. In any event, it is clear that the federal law of *res judicata* applies to a federal court judgment. *See, e.g., Jackson v. FIE Corp.*, 302 F. 3d 515, 529 n.58 (5th Cir. 2002).

Although the Louisiana law of *res judicata* is entirely irrelevant to these proceedings, the government discusses it anyway, as apparent *lagniappe*. The government cites several old Louisiana cases in support of its claim that the *res judicata* rule imposed here should be more restrictive then the federal *res judicata* rule, including *State v. American Sugar Refin. Co.*, 32 So. 965 (La. 1902). Even if the Louisiana law of *res judicata* were to apply (which it does not), *res judicata* under Louisiana law is not now significantly different from the federal law. In Louisiana:

> Except as otherwise provided by law, a valid and final judgment is conclusive between the same parties, except on appeal or other direct review, to the following extent:
>
> (1) If the judgment is in favor of the plaintiff, all causes of action existing at the time of final judgment arising out of the transaction or occurrence that is the subject matter of the litigation are extinguished and merged in the judgment.
>
> (2) If the judgment is in favor of the defendant, all causes of action existing at the time of final judgment arising out of the transaction or occurrence that is

> the subject matter of the litigation are extinguished and the judgment bars a subsequent action on those causes of action.
>
> (3) A judgment in favor of either the plaintiff or the defendant is conclusive, in any subsequent action between them, with respect to any issue actually litigated and determined if its determination was essential to that judgment.

La. Rev. Stat. Ann. § 13:4231 (West 2004). "[T]he new Louisiana law provides a broader application of res judicata, the purpose, now more aligned with that of federal law, being to foster judicial efficiency and to protect the final resolution of disputes by preventing needless litigation." *Louisiana Seafood Management v. Foster*, 46 F. Supp. 2d 533, 541 (E.D. La. 1999) (Citations omitted).

The government misinterprets *Moore v. Swayne-Hunter Farms, Inc.*, 841 S.W. 2d 308 (Mo. Ct. App. 1992). In *Moore*, the court found that a 1960 judgment in a condemnation proceeding condemning 10 acres of a 160 acre tract of land was binding on the parties where the ownership of the condemned portion of the land had been decided in the prior adjudication. The court specifically held:

> [T]he judgment in the . . . condemnation action adjudicated plaintiffs' interest in the land, that defendant was bound by that adjudication, and that plaintiffs were entitled to relief on their petition. This ruling makes it unnecessary to consider the respective contentions of the parties concerning the legal effect of the 1932 tax sale. . . .

Moore at 310. Plaintiff's claims to ownership of the remainder of this land were precluded by the prior adjudication in the condemnation proceeding.

The government seeks to use the "change in the law" exception to collateral estoppel, making repeated claims that it did not have an opportunity in the *Nebo* litigation to litigate the "choice of law issue." This "choice of law issue" is nothing more than the decisional law in *Little Lake*. The government could have raised any issue in *Nebo* that it raised in *Little Lake*, had it thought to do so. The government's argument that it did not get to address the "change in the law" created by this Court's decision in *Little Lake* is circular. It is axiomatic that one would never have had an opportunity to argue a later case in prior litigation. Further, there can be no doubt that choice of law was litigated in the original *Nebo* case. *See Nebo*, 90 F. Supp. 73, 85-88 (W.D. La. 1950), and Pet. 26-28. The *Nebo* decision clearly reflects a choice of law analysis. *Id.* at 83-88. The government's so-called "choice of law" issue is really the holding in *Little Lake*, and the decision in that case not to apply Act 315 of 1940.

The government's repeated diatribe that it should be allowed to relitigate title to this property because of a change in a "pure question of law" is inconsistent with the government's characterization of this case as "fact bound." The *Nebo* decision is undoubtedly a mixture of law and fact. *Nebo*'s holding that Act 315 applied, was based upon the Nebo *facts*. The government is playing with nomenclature to get a desired result. It claims that the legal issue involved here is a "pure" one, unless it better suits the government's purpose to say the case is "fact bound." The facts that apply are the undisputed facts that were found by the District Court. The District Court found that all 180,000 acres were "similarly situated." The Fifth Circuit could only reverse this conclusion by changing the facts found by the District Court. The Fifth Circuit found that the property was "separate" and described each servitude as a "distinct real right." (Pet. App. 23a) These are, quite simply, *not* the facts found by the District Court.

The government alleges that the plaintiffs will be at "an unfair advantage *vis a vis* other servitude holders on federal land for whom the rule of prescription undeniably applies." (Br. in Opp. 24) Actually, petitioners would only receive the benefit of the government's representations that prescription would not apply which has the same affect as application of La. Act 315 of 1940. Petitioners would not, as suggested by the government, be depriving any other servitude owner of any rights or benefits. This is also an argument of degree. Even the government concedes the 800 acres are not subject to prescription.

The government, citing discrete parts of comment (c) to the Restatement (Second) of Judgments § 28 (1982), further asserts that it is "hornbook law that collateral estoppel does not preclude relitigation of a legal issue when there has been an intervening change in the legal climate [e]ven when those claims are closely related." (Br. in Opp. 22) A close reading of the entirety of this comment reveals no clear application of the "change in the law" exception.

As this court has indicated, this area of the law is anything but "hornbook law." In *United States v. Stauffer Chemical Co.*, 464 U.S. 165 (1984) this court stated:

> While our discussion in *Montana* [*v. United States*, 440 U.S. 147 (1979)] indicates that the exception is generally recognized, *we are frank to admit uncertainty as to its application.* The exception seems to require a determination as to whether an "issue of fact" or an "issue of law" arises in a successive case that is so unrelated to the prior case that relitigation of the issue is warranted. Yet we agree that for the purpose of determining when to apply an estoppel,

> "[w]hen the claims in two separate actions between the same parties are the same or are closely related - for example, when they involve asserted obligations arising out of the same matter - it is not ordinarily necessary to characterize an issue as one of fact or law for the purposes of issue preclusion. If the issue has been actually litigated and determined and the determination was essential to the judgment, preclusion will apply. . . . In such a case it is unfair to the winning party and an unnecessary burden on the courts to allow repeated litigation of the same issue in what is essentially the same controversy, even if the issue is regarded as one of 'law'".

Id. at 171, quoting from *Restatement (Second) of Judgments*, § 28, cmt. (b) (1982) (emphasis added). *See also* Wright, Miller & Cooper, *Federal Practice and Procedure*: § 4425 (2002) at 659-663. ("[N]o clear rules have emerged as to the burden of supporting or defeating preclusion . . .")

The rule that the government advocates cannot be the rule where the facts are the same and the parties are the same. If it were the rule, then every judgment would be subject to reversal every time the law changed. Further, since the Fifth Circuit adopted a rule that was rejected by the Third Circuit in *O'Leary v. Liberty Mut. Ins. Co.*, 923 F. 2d 1062 (3d Cir. 1991), there is, in fact, a split in the circuits as to how the change in the law exception to collateral estoppel should apply.

The government seems to suggest that it can control the outcome of this case by invoking only part of the change in the law exception, and that only the part of that exception that it invoked should apply. It argues that, because it has

not "invoked" the specific exception based upon the change in the law described in *Stauffer* and *Burlington Northern R.R. Co. v. Hyundai Merchant Marine Co., Ltd.*, 63 F.3d 1227 (3d Cir. 1995), those cases do not apply here (Br. in Opp. 26.) This assertion by the government, that it can pick and choose which parts of the applicable rule that it wishes to apply, is absurd. One litigant cannot control his opponent's arguments by choosing, carefully, his own. The "change in the law" exception is not pertinent where, as here, the claims are identical, and the parties the same. *O'Leary, supra*, 923 F.2d 1062 at 1070.

Sullivan v. Gagnier, 225 F. 3d 161 (2d Cir. 2000), cited by the government, is inapposite. There, the court of appeals found that it could not apply collateral estoppel based upon a prior criminal conviction where "none of the records from the prior . . . proceeding . . . were before the district court." *Id.* at 166.

Lastly, the government claims that *certiorari* in this case is premature, since this decision is interlocutory. In this assertion the government is twice mistaken. First, the decision in this case appears to be final as to title based on La. Act 315 of 1940. Second, even assuming that the ruling is not final, the Fifth Circuit has, in its ruling, effectively deprived plaintiffs of a trial to litigate title to this acreage. The Fifth Circuit did not remand this case for trial, as one would expect in overturning a summary judgment motion. Instead, it remanded the case "so that the district court can determine which servitudes have in fact prescribed." (Pet. App. 28a)

CONCLUSION

A casual reader, not familiar with this litigation, could read the District Court's decision and the Court of Appeals' decision and be surprised to learn that both courts were deciding the same case. The government's brief provides no relief from this duality. Something is clearly wrong, and this court must intervene to prevent a miscarriage of justice and continued distortion of the law of finality of judgments. It has been twenty years since the Court decided *Stauffer*. This case presents a timely opportunity to revisit that decision. This Court should grant Petitioners' request for *certiorari* to resolve the split in the circuits regarding these significant issues of *res judicata* and collateral estoppel.

Respectfully submitted,

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